(12)

No. 98-1441-CFH Title: Ernest C. Roe, Warden, Petitioner
v.
Lucio Flores-Ortega

Docketed: March 10, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 5 1999	Application (98A648) for a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice O'Connor.
	Feb 8 1999	(98A648) Justice O'Connor issued the following order: It is Ordered that the mandate of the United States Court of Appeals for the Ninth Cirucit, case No. 97-17232 is stayed pending receipt of a response due on or before February 15, 1999, and further order of the undersigned or of the Court.
	Feb 8 1999	Response to application (98A648) from Lucio Ortega requested by Justice O'Connor, due February 15, 1999.
	Feb 12 1999	Response to application (98A648) filed by Lucio Ortega.
	Feb 16 1999	Application (98A648) denied by Justice O'Connor.
	Mar 4 1999	Petition for writ of certiorari filed. (Response due April 9, 1999)
	Mar 4 1999	40 copies suppl. appdx to ptn for a writ of certiorari filed.
	Mar 4 1999	Application (98A648) refiled and submitted to Justice Kennedy.
	Mar 15 1999	(98A648) Application scheduled for 3/19/99 Conference, Page 27.
	Mar 15 1999	Application (98A648) referred to the Court by Justice Kennedy.
	Mar 22 1999	Application (98A648) denied by the Court.
	Mar 31 1999	Brief of respondent Lucio Flores-Ortega in opposition filed.
	Mar 31 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Apr 14 1999	DISTRIBUTED. April 30, 1999
	Apr 16 1999	Reply brief of petitioner Ernest Roe, Warden filed.
	May 3 1999	Motion of respondent Lucio Flores-Ortega for leave to proceed in forma pauperis GRANTED.
	May 3 1999	Petition GRANTED. limited to Question 2 presented by the petition. SET FOR ARGUMENT November 1, 1999. **********
	May 19 1999	Order extending time to file brief of petitioner on the merits until July 1, 1999.
	May 28 1999	Letter and attachments of recent state trial court proceedings received from the Attorney General of California.
	Jul 1 1999	Joint appendix filed.
	Jul 1 1999	Brief of petitioner Ernest C. Roe, Warden filed.
	Jul 1 1999	Brief amicus curiae of United States filed.
	Jul 1 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jul 28 1999	Order extending time to file respondent's brief on the

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No. 98-1441-CFH

Entry	Date	Proceedings and Orders
		merits to and including August 6, 1999.
	Jul 29 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 5 1999	Brief of respondent Lucio Flores-Ortega filed.
	Aug 19 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 14 1999	Reply brief of petitioner Ernest C. Roe, Warden filed.
	Oct 1 1999	CIRCULATED.
	Oct 4 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 1 1999	ARGUED.
	Nov 1 1999	Record filed.

No. 981441 MAR 4 - 1999

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is "dictated by precedent" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of such a request by the defendant, particularly where the defendant has been advised of his appeal rights.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No.

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

OPINION BELOW[1]

Petitioner respectfully petitions for a writ of certiorari to review the November 2, 1998, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998) (No. 97-17232) (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California that denied Respondent's habeas corpus petition. Respondent is a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of the State of California.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Ortega v. Roe*, 160 F.3d 534; (B) the Ninth Circuit's unpublished Denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed December 11, 1998 (No. 97-17232); (C) the text of pertinent constitutional provisions, statutes, and court rules, namely:

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

(1) the Sixth Amendment to the United States Constitution; (2) California Penal Code § 1237.5; (3) California Penal Code § 1240.1; (4) California Rules of Court, Rule 31(d); (5) California Rules of Court, Rule 470.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, Petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on November 2, 1998. On December 11, 1998, the Ninth Circuit denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED IN THIS CASE

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix C. These authorities include: the Sixth Amendment to the United States Constitution; California Penal Code § 1237.5; California Penal Code § 1240.1; California Rules of Court, Rule 31(d); and California Rules of Court, Rule 470.

STATEMENT OF THE CASE

An information was filed in the Superior Court of California, in and for the County of Fresno ("superior court"), in case number 490730-9, charging Respondent Lucio Flores Ortega as follows: in count one, with

violating California Penal Code § 187 (murder);[2] and in counts two and three with violating § 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of § 12022(b) (an enhancement for the personal use of a deadly weapon).

On October 13, 1993, Respondent pled guilty to the murder count. On November 10, 1993, the superior court granted the prosecution's motion to dismiss counts two and three (assault with a deadly weapon) and to strike the § 12022(b) allegation of personal use of a deadly weapon.

On the same date, the superior court sentenced Respondent to fifteen years to life in state prison, with 267 days of custody credit. The superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit on or about February 20, 1998, at 10-11.) Nevertheless, Respondent did not file a timely notice of appeal.[3]

On March 24, 1994, Respondent attempted to file a late notice of appeal. On April 8, 1994, the clerk of the superior court informed Respondent that his notice was not filed because it was untimely. On August 12, 1994, the California Court of Appeal, Fifth Appellate

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2. All further statutory references are to the California Penal Code unless otherwise indicated.

This is not a capital case.

3. On January 9, 1994, Respondent's conviction became "final" within the meaning of *Teague*. "Finality" is the denial of a petition for certiorari or expiration of time within which to petition for certiorari. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987). In this case, Respondent was sentenced on November 10, 1993, and had sixty days in which to file a notice of appeal which was not filed. The time to file a petition for writ of certiorari expired at that time. Respondent's conviction therefore became final on January 9, 1994. *See* Cal. Rules of Court, Rule 31(a). (This Rule of Court is not included in Appendix C because of its marginal relevance to the questions presented.)

District, denied Respondent's petition for writ of habeas corpus which included a motion for leave to file a belated notice of appeal. On January 18, 1995, the California Supreme Court denied Respondent's habeas corpus petition filed therein, which requested the same relief.

On July 27, 1995, pursuant to 28 U.S.C. § 2254, Respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, and Petitioner answered on November 17, 1995. The District Court's jurisdiction was conferred by 28 U.S.C. § 2254.

In his federal habeas petition, Respondent claimed that his state trial counsel (Ms. Nancy Kops) promised to file a notice of appeal on his behalf and failed to do so. Following appointment of the Federal Defender as Respondent's counsel, an evidentiary hearing was held on January 24, 1997, to address the sole issue of the credibility of this assertion.

On April 3, 1997, the Magistrate Judge filed his Findings and Recommendations ("F&Rs"), recommending denial of the petition. Respondent filed objections and Petitioner replied. On June 30, 1997, the District Court adopted the F&Rs, and denied the petition. In so doing, the District Court found that Respondent had not met his burden of showing that trial counsel promised to file a notice of appeal. The District Court also determined that Respondent was not entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), which requires a defendant's consent before counsel may abandon a potential appeal, because *Stearns* is a "new rule" barred by *Teague*.

On July 16, 1997, Respondent filed a timely notice of appeal in the Ninth Circuit. A certificate of probable cause was issued. The parties filed appellate briefs. The Ninth Circuit's jurisdiction was conferred by 28 U.S.C. § 2253.

In a published opinion, *Ortega*, 160 F.3d 534, filed November 2, 1998, the Ninth Circuit reversed and remanded. The Ninth Circuit held that *Stearns* did not state a "new rule," rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). In *Lozada*, the Ninth Circuit held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668 (1984), if it is established that counsel's failure to file a notice of appeal was without the defendant's consent. The Ninth Circuit's *Ortega* decision instructed the District Court to issue a conditional writ releasing Respondent from state custody unless the state trial court vacated and reentered Respondent's judgment of conviction and allowed a fresh appeal. (Appendix A.) The Ninth Circuit's judgment was entered on this date.[4]

On November 16, 1998, Petitioner filed a timely Petition for Rehearing With Suggestion for Rehearing En Banc. On December 11, 1998, the Ninth Circuit denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. (Appendix B.)

On January 14, 1999, the Ninth Circuit denied Petitioner's Motion for Stay of Issuance of Mandate for time to file a petition to the United States Supreme Court for writ of certiorari.[5]

On February 5, 1999, Petitioner filed an application to stay the Ninth Circuit's mandate directed to Circuit Justice Sandra Day O'Connor. (A-648.) On February 16, 1999, this application was denied.

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4. In at least one case, the Ninth Circuit has granted relief based on *Stearns* and *Ortega*. *Salmon v. Carrillo*, No. 96-55707 (9th Cir. Nov. 13, 1998) [1998 WL 792290] [unpublished disposition].

5. The January 14, 1999, order erroneously refers to "[a]ppellant's" motion for stay of mandate. In fact, the motion of Petitioner, Respondent-Appellee in the Ninth Circuit, was the subject of the order.

Petitioner intends to renew his stay application in this Court. If necessary, Petitioner will file a stay application in the state trial court and/or the California Court of Appeal, Fifth Appellate District. (Opposition to Application to Stay Mandate of United States Court of Appeals for the Ninth Circuit Pending Certiorari at 5 [Petitioner may seek state appellate court stay].)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons: First, the Ninth Circuit's *Ortega* opinion conflicts with United States Supreme Court authority, other federal circuit authority, and state supreme court authority on the issue of whether United States Supreme Court authority, as opposed to federal circuit court authority, determines whether a rule is "dictated by precedent" within the meaning of *Teague*.[6] Second, *Ortega* conflicts with other federal circuit court authority and California law on the issue of whether trial counsel is required to file a notice of appeal following a guilty plea in the absence of such a request by the defendant.[7]

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following,

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6. Petitioner acknowledges that federal circuit court authority may show that a rule is *not* dictated by precedent within the meaning of *Teague*. The Ninth Circuit has correctly indicated that a rule is not dictated by precedent where reasonable courts might disagree about its application. *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-25 (9th Cir. 1991); *see also Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995). The Eleventh Circuit is in accord. *Glock v. Singletary*, 65 F.3d 878, 885 (11th Cir. 1995) (en banc). Indeed, the United States Supreme Court has recently said that unless a result is apparent to all reasonable jurists, i.e., no other interpretation is reasonable, the result is not dictated by precedent. *Lambrix v. Singletary*, 520 U.S. 518, ___, 117 S.Ct. 1517, 1530, 137 L.Ed.2d 771 (1997).

7. As noted, the superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit, on or about February 20, 1998, at 10-11.)

although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; . . .
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

. . . .

In the present case, certiorari should be granted for the two reasons noted above: First, *Ortega* conflicts with United States Supreme Court authority, other federal circuit authority, and state supreme court authority on the issue of whether United States Supreme Court precedent, as opposed to federal circuit court precedent, determines whether a rule is "dictated by precedent" within the meaning of *Teague*. As noted, *Ortega* relied on a prior Ninth Circuit decision (*Lozada*) in determining that *Stearns* was not *Teague*-barred. However, as shown below, United States Supreme Court authority, other federal circuit court authority, and state supreme court authority

all indicate that it is United States Supreme Court precedent *alone* which determines whether a rule is "dictated by precedent" per *Teague*. Thus, *Ortega* conflicts with United States Supreme Court authority (Rule 10(c)), other federal circuit court authority (Rule 10(a)), and state supreme court authority (Rule 10(a)). Clearly, this is an important federal question. Rule 10(a), (c).

Second, certiorari should be granted because *Ortega* conflicts with other federal circuit court authority and California law on the issue of whether trial counsel is required to file a notice of appeal following a guilty plea in the absence of a request by the defendant. *Ortega* follows *Stearns*, which held that it is ineffective assistance if it is established that counsel's failure to file a notice of appeal after a guilty plea was without the defendant's consent. Other federal circuits have stated that counsel has no constitutional duty to file a notice of appeal in the absence of a request by the defendant. Likewise, California law does not require the filing of a notice of appeal unless (1) there are arguably meritorious grounds, or (2) the defendant so requests. Thus, *Ortega* conflicts with other federal circuit authority (Rule 10(a)) and California law (*cf.* Rule 10(a) [conflict with state supreme court]). Obviously, the issue of whether trial counsel is constitutionally required to file a notice of appeal after a plea, without a request, is an important federal question. Rule 10(a). These arguments are presented in greater detail below.

ARGUMENT

I.

THE NINTH CIRCUIT'S *ORTEGA* DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT, OTHER FEDERAL CIRCUIT PRECEDENT, AND STATE SUPREME COURT PRECEDENT: IT IS UNITED STATES SUPREME COURT PRECEDENT, NOT CIRCUIT COURT PRECEDENT, WHICH DETERMINES WHETHER A RULE IS DICTATED BY PRECEDENT WITHIN THE MEANING OF *TEAGUE*

Ortega conflicts with United States Supreme Court precedent, other federal circuit precedent, and state supreme court authority. These authorities indicate that it is United States Supreme Court authority, not circuit court authority, which determines whether a rule is dictated by precedent within the meaning of *Teague*. *Ortega* erroneously relied on Ninth Circuit precedent in determining that a rule was not *Teague*-barred. *Ortega* held that *Stearns*, 68 F.3d 328, was not a new rule; rather, it was an application of the rule in *Lozada*, 964 F.2d 956. As shown below, United States Supreme Court authority, other federal circuit authority, and state supreme court authority indicate that it is United States Supreme Court precedent, not circuit court precedent, that determines whether a rule is dictated by precedent within *Teague*'s

meaning.[8] Because *Ortega* conflicts with this authority, certiorari should be granted.

A. United States Supreme Court Authority Indicates That It Is United States Supreme Court Authority That Controls For *Teague* Purposes

United States Supreme Court authority indicates that it is United States Supreme Court precedent which determines whether a rule is dictated by precedent within *Teague*'s meaning. *Teague* itself supports this. In *Teague* the Supreme Court stated that a new rule is one which breaks new ground or imposes a new obligation on the states or Federal Government. The Supreme Court cited examples of such rules; both were United States Supreme Court decisions. *Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.), citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); and *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). *See also Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.), citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting) (stating that *Skipper v. South Carolina*, 476 U.S. 1 (1986), is a new rule). *See also Teague*, 489 U.S. at 301 (plurality opinion by O'Connor, J.): applying fair cross section requirement to petit juries would be a new rule, citing *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Akins v. Texas*, 325 U.S. 398, 403 (1945).

Moreover, the *Teague* court gave additional authority affirming that it is United States Supreme Court

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8. Respondent may attempt to argue that *Lozada* was merely applying United States Supreme Court precedent. However, in stating that prejudice would be presumed where counsel's failure to file was without the defendant's *consent* (as opposed to a failure to file despite the defendant's request), *Lozada* cited no United States Supreme Court authority, or authority of any kind. *Lozada*, 964 F.2d at 958.

precedent which determines whether a rule is dictated by precedent. The *Teague* court cited a prior concurring opinion by Justice Jackson (*Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., concurring in the result)) for the proposition that state courts cannot anticipate "this Court's" due process requirements, i.e., the Supreme Court's due process requirements. *Teague*, 489 U.S. at 310 (plurality opinion by O'Connor, J.). Thus, the *Teague* court itself indicated that it is United States Supreme Court authority which determines whether a rule is dictated by precedent per *Teague*.

A passage from the comparatively recent case of *Lambrix*, 520 U.S. 518, ___, 117 S.Ct. 1517, 137 L.Ed.2d 771, also supports this view. In the pertinent passage, the majority opinion responds to the dissenting opinion's view that *Espinosa v. Florida*, 505 U.S. 1079 (1992) (which concerns capital sentencing) was a reasonable interpretation of the law. The *Lambrix* court states that the *Teague* inquiry is applied to "Supreme Court decisions[.]" *Lambrix*, 117 S.Ct. at 1530. Thus, the *Lambrix* court clearly established that the *Teague* inquiry is one based on United States Supreme Court precedent.

Additional United States Supreme Court authority supports this principle. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the Ninth Circuit stated in dicta that "[d]espite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view." *Id.* at 736. However, in vacating the Ninth Circuit's later decision in that case, the Supreme Court characterized the circuit court's discussion of the binding effect of lower federal court decisions on state courts as "remarkable." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1064 n.11 . . . (1997) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 . . . (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow

rulings of federal courts of appeals on questions of federal law)); *see also Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) and cases cited therein. Thus, the United States Supreme Court has recently made its view clear: lower federal court authority is not binding on the state courts. Consequently, federal circuit court authority also cannot be controlling precedent for *Teague* purposes. *Ortega* conflicts with United States Supreme Court authority on this point; thus, certiorari should be granted.

Individual Supreme Court justices have expressed the view that state courts are bound only by United States Supreme Court authority. *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., joined by White and Marshall, JJ., concurring and dissenting).

Thus, United States Supreme Court authority indicates that it is United States Supreme Court authority that controls for *Teague* purposes.

B. Federal Circuit Court Authority Indicates That United States Supreme Court Authority Controls For *Teague* Purposes

Further, *Ortega* conflicts with federal appellate court decisions which conclude that state courts are bound only by United States Supreme Court authority. *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), and cases cited therein;[9] *Owsley v.*

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9. *United States ex rel. Lawrence v. Woods* was criticized by *Netzel v. United Parcel Service*, 165 Ill.App.3d 685, 692-95, 520 N.E.2d 665, 669-71, 117 Ill.Dec. 314, 318-20 (Ill.App.Ct. 1987). However, this criticism was based on a distinction between matters of federal constitutional law and matters of federal statutory interpretation which is not pertinent here. 165 Ill.App.3d at 692-93, 520 N.E.2d at

Peyton, 352 F.2d 804, 805 (4th Cir. 1965). Because these decisions conclude that state courts are bound only by United States Supreme Court precedent, they support the proposition that only United States Supreme Court precedent can be controlling for *Teague* purposes. Therefore, *Ortega* conflicts with them.

Two more recent federal circuit decisions support Petitioner's position that lower federal court authority is not binding on the states: *Clemmons v. Delo*, 124 F.3d 944, 955 n.11 (8th Cir. 1997) (assuming, without deciding, that "firmly dictated by precedent" refers to United States Supreme Court precedent), and *Glock v. Singletary*, 65 F.3d at 885 (federal appellate courts do not dictate rules to state courts for *Teague* purposes). *But see Jiminez v. Myers*, 40 F.3d 976, 979-81 (9th Cir. 1994).[10]

670, 117 Ill.Dec. at 319. The present case involves a matter of federal constitutional law. Even *Netzel* seems to acknowledge that lower federal court decisions are not binding on state courts as to matters of constitutional law, at least where there is a conflict between circuits. 165 Ill.App.3d at 692, 520 N.E.2d at 670, 117 Ill.Dec. at 319. Further, the *Netzel* decision was later reversed by the Illinois Supreme Court in a "supervisory order[.]" *Netzel v. United Parcel Service*, 181 Ill.App.3d 808, 811, 537 N.E.2d 1348, 1349, 130 Ill.Dec. 879, 880 (Ill.App.Ct. 1989). Finally, the Illinois Supreme Court seems to have adopted the view that Illinois courts are not bound by lower federal courts, at least where there is a split between the circuits. *People v. Bean*, 137 Ill.2d 65, 114, 560 N.E.2d 258, 280, 147 Ill.Dec. 891, 913 (Ill. 1990), citing *People v. Stansberry*, 47 Ill.2d 541, 545, 268 N.E.2d 431, 433 (Ill. 1971). *Stansberry* was overruled on other grounds in *People v. Laws*, 84 Ill.2d 493, 497-98, 504, 419 N.E.2d 1150, 1152-53, 1155-56, 50 Ill.Dec. 701, 703-04, 706-07 (Ill. 1981).

10. Petitioner acknowledges that some other recent circuit court authority appears contrary to his position. *See O'Brien v. Dubois*, 145 F.3d 16, 23-24 (1st Cir. 1998), citing *Ciak v. United States*, 59 F.3d 296, 302-03 (2d Cir. 1995). However, upon closer examination, *Ciak* is not contrary to Petitioner's position. The *Ciak* court addressed whether *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994), stated a new rule. In concluding that *Levy* did not state a new rule, the *Ciak* court noted that *Levy* relied on, inter alia, United States Supreme Court precedent. 59 F.3d at 303. Thus, *Ciak* does not support the proposition that circuit court authority can be controlling for *Teague* purposes. Moreover, for the reasons stated in this petition, Petitioner submits that circuit precedent cannot establish a rule for *Teague* purposes. Further, this is especially true where, as here, there is a split of authority in the circuit courts.

C. State Court Authority Indicates That United States Supreme Court Precedent Controls For *Teague* Purposes

Many state courts, including courts of last resort, have reached the conclusion that lower federal court authority is not binding on the states. The following listing is illustrative, but not comprehensive: *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So.2d 905, 913 (Ala. 1995) (stating that prior decision[11] was not binding on whether Eleventh Circuit authority is binding on state; correct rule: state supreme court may rely on decision of any federal court, but is bound by United States Supreme Court); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So.2d 367, 373, n.1 (Ala. 1993); *People v. Avena*, 13 Cal.4th 394, 431, 916 P.2d 1000, 1022, 53 Cal.Rptr.2d 301, 323 (Cal. 1996);[12] *Blue Cross of California v. Superior*

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11. *Ex parte Gurganus*, 603 So.2d 903, 906 (Ala. 1992) (federal decisional law, interpreting a federal statute, is binding on Alabama Supreme Court).

12. *But see People v. Bradley*, 1 Cal.3d 80, 86, 460 P.2d 129, 132, 81 Cal.Rptr. 457, 460 (Cal. 1969) (lower federal court decisions are persuasive and entitled to great

Court, 67 Cal.App.4th 42, 56, 78 Cal.Rptr.2d 779, 788 (Cal.Ct.App. 1998), petition for review denied January 13, 1999 (California Court of Appeal not bound by lower federal court decisions construing Federal Arbitration Act); *Tully v. World Savings & Loan Assn.*, 56 Cal.App.4th 654, 663, 65 Cal.Rptr.2d 545, 550 (Cal.Ct.App. 1997); *Conner v. State*, 251 Ga. 113, 118, 303 S.E.2d 266, 273 (Ga. 1983); *Bean*, 137 Ill.2d at 114, 560 N.E.2d at 280, 147 Ill.Dec. at 913 (citing prior Illinois Supreme Court case: Illinois courts not bound by lower federal courts);[12] *Greene v. State*, 11 Md.App. 106, 110, 273 A.2d 830, 833 (Md.Ct.Spec.App. 1971); *Planned Parenthood of New York City, Inc. v. State, Dept. of Institutions and Agencies*, 75 N.J. 49, 53, 379 A.2d 841, 842-43 (N.J. 1977) (New Jersey Supreme Court not bound by lower federal court decision invalidating state abortion statute); *State v. Glover*, 60 Ohio App.2d 283, 287, 396 N.E.2d 1064, 1067 (Ohio Ct.App. 1978); *Cook v. Lilly*, 158 W.Va. 99, 101, 208 S.E.2d 784, 786 (W.Va. 1974); *State v. Webster*, 114 Wis.2d 418, 426 n.4, 338 N.W.2d 474, 478 n.4 (Wis. 1983). *But see Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (Ala. 1935) (circuit court's construction of federal statute held to be binding); *St. Cloud v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994) (state courts are bound by federal decisions interpreting federal statute; citing cases); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725, 727 (Utah 1918).

Thus, substantial authority supports the conclusion that state courts are not bound by lower federal courts. If state courts are not bound by lower

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weight).

13. At the time of the prior Illinois Supreme Court case, *Stansberry*, 47 Ill.2d at 545, 268 N.E.2d at 433, there was a split between the federal circuits on the matter at issue.

federal court authority, then lower federal court authority cannot be controlling precedent for *Teague* purposes. United States Supreme Court authority, federal circuit court authority, and state supreme court authority all indicate that state courts cannot be bound by lower federal courts. As noted, *Teague*, 489 U.S. at 301, 310 (plurality opinion by O'Connor, J.), and *Lambrix*, 117 S.Ct. at 1530, also contain additional language indicating that only United States Supreme Court authority is controlling under *Teague*. *Ortega* conflicts with this authority. Consequently, certiorari should be granted.

II.

THERE IS A SPLIT OF FEDERAL CIRCUIT AUTHORITY ON THE ISSUE OF WHEN DEFENSE COUNSEL MUST FILE A NOTICE OF APPEAL FOLLOWING A GUILTY PLEA; THE NINTH CIRCUIT'S *ORTEGA* DECISION ALSO CONFLICTS WITH CALIFORNIA LAW ON THIS MATTER

There is a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea. The Ninth Circuit's *Ortega* decision also conflicts with California law on this matter. Consequently, certiorari should be granted.

A. There Is A Split Of Federal Circuit Court Authority As To When Defense Counsel Must File A Notice Of Appeal Following A Guilty Plea

In the present case, there is a split of circuit court authority on the issue of when defense counsel has a duty to file a notice of appeal following a guilty plea. In *Stearns*, 68 F.3d at 330, the Ninth Circuit held that even in a guilty plea case, a *federal* prisoner may obtain habeas relief merely by showing that he did not consent to counsel's failure to file a notice of appeal. Other circuit courts have stated that the defendant must ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue[]"); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557

(10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). As the Sixth Circuit recently stated:

> We emphasize, of course, that a defendant's actual "request" is still a critical element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request. [Citations omitted.]

Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998).

Additional recent circuit court opinions have disagreed with *Stearns*. *Morales v. United States*, 143 F.3d 94, 96-97 (2d Cir. 1998) (agreeing with *Castellanos*); *Fernandez v. United States*, 146 F.3d 148, 148-49 (2d Cir. 1998) (following *Morales*). The Fifth Circuit has also followed *Castellanos*. *United States v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996).[14]

Thus, many circuits have adopted a rule different from *Stearns*. This rule is supported by federal circuit court authority stating that, at least as of January 1994 (when Respondent's case became final), there was not even a recognized federal constitutional duty to advise defendants of their appeal rights after a guilty plea. *See, e.g., Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (federal defendants); *see also Belford v. United States*, 975 F.2d 310, 314-15 (7th Cir. 1992) (citing cases), overruled on other grounds in *Castellanos*, 26 F.3d at 720 (defendant need not show prejudice from failing to file an appeal); *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992) (exceptions for answering inquiry and constitutional issues); *see also United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989) (after guilty plea, no grounds

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14. *Guerra* did not address *Stearns*.

for direct federal appeal except sentence), abrogated on different grounds in *Lozada*, 964 F.2d at 957.[15] Instead, a federal habeas petitioner would have to show that he/she requested his/her attorney to file a notice of appeal and the attorney failed to do so. Indeed, as noted, other circuit courts had stated that a defendant had to ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos*, 26 F.3d at 719.

Moreover, although their holdings were not so limited, *Ludwig*, *Fernandez*, *Morales*, *Guerra*, *Castellanos* and *Peak* involved defendants who pleaded guilty as did Respondent here. *Ludwig*, 162 F.3d at 457; *Fernandez*, 146 F.3d at 148; *Morales*, 143 F.3d at 94, 95; *Guerra*, 94 F.3d at 991; *Castellanos*, 26 F.3d at 718; *Peak*, 992 F.2d at 40.

The above-described split of authority between the Ninth Circuit panels in *Stearns* and the present case and other circuits (as represented by *Castellanos*, *Peak*, *Davis*, *Abels*, *Ludwig*, *Morales*, *Fernandez*, and *Guerra*) means that certiorari should be granted. Clearly, the rule as to when defense counsel must file a notice of appeal following a guilty plea is an important matter. Rule 10(a).

B. *Ortega* Also Conflicts With California Law

The Ninth Circuit's *Ortega* decision also conflicts with California law. California's legal landscape (at least as of January 1994) would not have required the filing of a notice of appeal. For example, a sentencing court was not required to advise a defendant of his/her appeal rights following a guilty plea. Cal. Rules of Court, Rule 470

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15. Apparently, counsel still have no constitutional duty to advise federal defendants of their appellate rights. *Ludwig*, 162 F.3d at 459; *Morales*, 143 F.3d at 97 (quoting *Castellanos*, 26 F.3d at 719, with approval).

(this rule is still in effect); *see also People v. Serrano*, 33 Cal.App.3d 331, 337-38, 109 Cal.Rtpr. 30, 33-34 (Cal.Ct.App. 1973) (no duty by trial court to advise defendant of right to appeal after guilty plea). However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." § 1240.1(a).

Under § 1240.1, defense counsel is required to file a notice of appeal only if there are arguably meritorious appellate issues or the defendant directs that an appeal be filed. § 1240.1(b). These statutory provisions are still in effect.

Petitioner submits that there do not appear to have been any arguably meritorious appellate issues. In the present case, Ms. Kops was representing Respondent, an indigent, who entered a guilty plea to second degree murder. Ms. Kops testified that in her opinion the only grounds for appealing the sentence would have been that the sentencing court abused its discretion in denying probation, and such a claim would almost certainly fail. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 43-44.) It does not appear that there would have been any grounds for attacking the validity of the plea on appeal. (Excerpts of Record, filed in the Ninth Circuit on or about February 20, 1998, at 89-107 [entry of plea].) Ms. Kops also testified that even if she had not encouraged a client to file a notice of appeal, if a client had asked her to do so, she would have filed a notice. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 49-50.)

The District Court found that had Respondent requested that trial counsel file a notice of appeal, she would have done so. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 76

[Magistrate Judge's finding].) Thus, at least as of January 1994, California law would not have required the filing of a notice of appeal in the present case. California law remains the same today. § 1240.1(b).

Accordingly, *Stearns* and *Ortega* have effectively declared California Penal Code § 1240.1(b) unconstitutional. Thus, *Ortega* clearly conflicts with California law on the issue of when defense counsel must file a notice of appeal following a guilty plea. This also calls for a grant of certiorari.

Moreover, California has a rule requiring defendants to exercise personal diligence in ensuring that notices of appeal are filed. *Cf. In re Benoit*, 10 Cal.3d 72, 88-89, 514 P.2d 97, 108, 109 Cal.Rptr. 785, 796 (Cal. 1973). *Ortega* conflicts with this decision, making a grant of certiorari necessary.[16]

For all of the above reasons, a grant of certiorari is needed.

C. There Are Additional Reasons For Reversing *Ortega*

There are additional reasons for reversing *Ortega*: *Lozada* is distinguishable from *Stearns*; further, *Stearns* is distinguishable from the present case and was wrongly decided.

Petitioner submits that *Lozada* is distinguishable from *Stearns* and the present case. *Lozada* was not a guilty plea case. *Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994). In California, a guilty plea

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16. As noted, the superior court advised Respondent of his appeal rights and the applicable time limits. (Excerpts of Record, filed in the Ninth Circuit, on or about February 20, 1998, at 10-11.) The *Stearns* court found such advice unimportant. *Stearns*, 68 F.3d at 330.

admits all matters essential to the conviction. *People v. DeVaughn*, 18 Cal.3d 889, 895-96, 558 P.2d 872, 875, 135 Cal.Rptr. 786, 789 (Cal. 1977); *see also People v. Turner*, 171 Cal.App.3d 116, 125-26, 214 Cal.Rptr. 572, 577 (Cal.Ct.App. 1985) (guilty plea waives right to raise questions regarding evidence). Indeed, California generally requires a certificate of probable cause for an appeal from a judgment following a guilty plea. § 1237.5; Cal. Rules of Court, Rule 31(d).

Further, Petitioner submits that *Stearns* (upon which *Ortega* relies) is distinguishable and was wrongly decided. *Stearns* is distinguishable because it involved a habeas action by a federal prisoner and did not involve California law as does this case. *Stearns*, 68 F.3d at 329. The present case involves an appeal from a state court judgment under state procedural rules specifically limiting trial counsel's duties with respect to filing a notice of appeal (e.g., § 1240.1(b)). Whatever merit the *Stearns* rule has in the federal context, it should not be extended to state court proceedings. In light of § 1240.1(b), it is difficult to understand how counsel could have had a duty to file a notice of appeal, let alone a duty to file one just because Respondent did not consent to the abandonment of his appeal.

Moreover, *Stearns* involved a complex sentencing scheme which precluded trial counsel from assuming that the defendant did not want to plead guilty. *Stearns*, 68 F.3d at 330. In the present case, there were no meritorious grounds for appealing Respondent's sentence. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 43-44.) Thus, *Stearns* is distinguishable on this basis as well.

Further, *Stearns* was wrongly decided. As noted, in *Stearns* the Ninth Circuit stated that the issue was whether the defendant consented to the failure to file a notice of appeal, rather than whether counsel ignored an explicit request to file. *Stearns*, 68 F.3d at 330. However,

other circuits have explicitly held otherwise and have required such a request be made. *See, e.g., Castellanos*, 26 F.3d at 719. Petitioner submits that *Castellanos* states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances and regardless of state law to the contrary (e.g., California law).

Finally, if the *Ortega* decision stands, every defendant who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, regardless of the amount of time since the conviction. This would even subject final judgments to challenge via habeas corpus petitions based on claimed lack-of-consent even though California law has never required an attorney to obtain consent before abandoning an appeal following a guilty plea.

For all of the foregoing reasons, this Court should grant certiorari.

CONCLUSION

Thus, *Ortega* conflicts with United States Supreme Court authority, other federal circuit court authority, and state supreme court authority on the issue of whether United States Supreme Court precedent alone determines whether a rule is "dictated by precedent" for *Teague* purposes. Further, there is a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea; *Ortega* also conflicts with California law on this point. Accordingly, this case represents an opportunity for this Court to resolve two important federal issues. For the reasons discussed above, Petitioner respectfully asks that this Court grant certiorari and resolve the important issues of law presented herein.

Dated: March 2, 1999.

Respectfully submitted,

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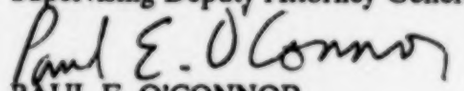

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Counsel of Record

Counsel for Petitioner

APPENDIX A

Ortega v. Roe, 160 F.3d 534 (9th Cir. 1998),
filed November 2, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lucio Flores Ortega, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
Ernest C. Roe, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted Oct. 5, 1998.*
San Francisco, California

Filed November 2, 1998

Before: Robert R. Beezer, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Beezer.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

COUNSEL

Ann H. Voris, Assistant Federal Defender, Fresno, California, for the petitioner-appellant.

Paul E. O'Connor, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

BEEZER, Circuit Judge:

Lucio Flores Ortega appeals the denial of his petition for habeas corpus. We address the question whether our opinion in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), expressed a new rule barred from application in the present matter by *Teague v. Lane*, 489 U.S. 288 (1989). We hold that *Stearns* did not express a new rule, rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). We have jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I

A

Petitioner pled guilty to second degree murder in a California Superior Court on October 13, 1993. At the plea hearing, petitioner was represented by a public defender. During the hearing the public defender wrote in her file "bring appeal papers." On March 24, 1994 petitioner attempted to file a notice of appeal which was rejected as untimely.

Petitioner filed a state court petition for a writ of habeas corpus on the ground that trial counsel was ineffective for failing to file a timely notice of appeal. Petitioner subsequently exhausted his state court remedies.

On July 27, 1995, petitioner filed a federal petition for habeas corpus. Respondent answered on November 17, 1995. The matter was referred to a magistrate judge, who held an evidentiary hearing on the limited issue of the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf.

After the hearing, the magistrate judge made the following findings: Petitioner "had little or no understanding" of what an appeal meant or the appeals process. Petitioner had not proved that his counsel had promised to file a notice of appeal. Petitioner did not consent to counsel's failure to file a notice of appeal. The magistrate judge considered whether our opinion in *Stearns* applied to petitioner's claims but ultimately concluded that petitioner was not entitled to relief under *Stearns* on the theory that *Stearns* stated a "new rule" which could not be applied retroactively under *Teague v. Lane*.

The district court adopted the magistrate judge's recommendation that the petition be denied. The court subsequently granted petitioner a certificate of probable cause and this timely appeal followed.

B

We review de novo the denial of a § 2255 motion [sic]. *Stearns*, 68 F.3d at 329. The district court's factual findings are reviewed for clear error. *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1072 (9th Cir. 1998).

To establish ineffective assistance of counsel, a petitioner must prove that: (1) counsel's performance was ineffective and (2) the ineffective performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Stearns*, we held that failure to appeal after a plea agreement is ineffective assistance of counsel without a specific showing of prejudice. *Stearns*, 68 F.3d at 329-30. A petitioner "need only show that he did not consent to the failure to file." *Id.* at 330. The magistrate judge found that petitioner did not consent to the failure to file a notice of appeal. This finding, reviewed for clear error, resolves the application of *Stearns* in petitioner's favor.

II

Resolution of the present matter hinges on whether we expressed in *Stearns* a "new rule" as defined by *Teague*. *Teague* requires a three-step analysis. First, the court must determine the date on which the petitioner's conviction became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Second, it must "[s]urvey[ ] the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, "if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. 518, ----, 117 S.Ct. 1517, 1524-25 (1997).

Those exceptions apply where either (1) "the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the Constitution;" or (2) the rule announces a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 477-78 (internal quotations omitted). Watershed rules are those which are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. The exception is "meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478 (internal quotations omitted).

Steps one and three of the *Teague* analysis are clearly resolved in respondent's favor. *Stearns* postdates

petitioner's case. Petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. *Stearns* was filed on October 12, 1995. Additionally, *Stearns* does not fit under the narrow exceptions to *Teague* reserved for rules that go to the fundamental fairness of the adjudicative process.

The second element of the *Teague* analysis, however, requires reversal. A "new rule," as contemplated by *Teague*, is one which "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or 'was not dictated by precedent existing at the time the defendant's conviction became final.' " *Snook v. Wood*, 89 F.3d 605, 612 (9th Cir. 1996) (quoting *Teague*, 489 U.S. at 301).

Stearns tracks our opinion in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction. In *Lozada*, we held that "'prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was *without the petitioner's consent*.'" *Stearns*, 68 F.3d at 329 (quoting *Lozada*, 964 F.2d at 958) (emphasis in original). In *Stearns*, we reasoned that *Lozada* "would automatically demand reversal in this case, but for one distinction[:] The judgement in this case was entered after a plea rather than after a trial." *Id.* at 330. We conclude that *Stearns* was merely an application of the rule in *Lozada*. Petitioner does not rely on a new rule and his petition is not barred by *Teague*.

III

The district court is instructed to issue a conditional writ releasing Ortega from state custody unless the state trial court vacates and reenters petitioner's judgment of conviction and allows a fresh appeal. We REVERSE and REMAND.

APPENDIX B

Ninth Circuit's Denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed December 11, 1998

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
ERNEST C. ROE, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	ORDER

Before: BEEZER, HALL and RYMER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

The Text of Pertinent Constitutional Provisions, Statutes, and Court Rules:

(1) Sixth Amendment, United States Constitution
(2) California Penal Code § 1237.5
(3) California Penal Code § 1240.1
(4) California Rules of Court, Rule 31(d)
(5) California Rules of Court, Rule 470

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

California Penal Code § 1237.5 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.
>
> This section shall become operative on January 1, 1992.

California Penal Code § 1240.1 provides, in pertinent part:

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document,

paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

California Rules of Court, Rule 31, provides, in pertinent part:

(d) [Guilty or nolo contendere plea] If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after

the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

California Rules of Court, Rule 470, provides:

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the

necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.

(2)

No. 98-1441 MAR 4 - 1999

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF APPENDICES

APPENDIX - A -

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	) CV F-95-5612
	) GEB HGB P
Petitioner,	)
v.	) ORDER RE:
	) FINDINGS &
ERNEST C. ROE,	) RECOMMENDATION
	) (#27) AND
Respondent.	) OBJECTIONS (#28)
	)
_____	)

Petitioner, a state prisoner proceeding in forma pauperis with appointed counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On April 3, 1997, the magistrate judge filed findings and recommendation herein which were served on both parties and which contained notice to both parties that any objections to the findings and recommendation were to be filed within thirty (30) days. On May 2, 1997,

petitioner filed timely objections to the findings and recommendation.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendation to be supported by the record and by proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendation filed April 3, 1997, is adopted in full; and

2. Petitioner's application for writ of habeas corpus is denied.

DATED: June 30, 1997

GARLAND E. BURRELL
UNITED STATES DISTRICT JUDGE

APPENDIX - B -

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, *Petitioner,*	) No. CV F-95-5612 GEB HGB P
v.	)
ERNEST C. ROE, *Respondent.*	) FINDINGS AND RECOMMENDATIONS RE: PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254.

BACKGROUND

Petitioner was charged by information in case number 490730-9 in the Superior Court of the State of California, County of Fresno, with murder, with a personal use of a deadly weapon enhancement, and two counts of assault with a deadly weapon. Pursuant to a plea bargain, petitioner pled guilty to second degree murder and on November 10, 1993, was sentenced to 15 years to life in state prison.

Petitioner did not file a timely notice of appeal. However, on March 24, 1994, petitioner attempted to file a notice of appeal but was advised by the Clerk of the Fresno County Superior Court that his notice was not filed because it was untimely. Petitions for a writ of habeas corpus were filed with both the California Court of Appeal for the Fifth Appellate District and with the California Supreme Court alleging ineffective assistance of trial counsel due to counsel's failure to file a timely notice of appeal. Both petitions were denied, the latter on January 18, 1995.

The instant petition for a writ of habeas corpus was filed in this court on July 27, 1995, and respondent's answer, filed on November 17, 1995, concedes petitioner has exhausted his state court remedies.

DISCUSSION

On October 13, 1993, the date set for his jury trial to commence, petitioner appeared in Superior Court with his court appointed public defender, Ms. Nancy

Kops, and a state certified Spanish interpreter and entered a plea of guilty to second degree murder. The plea was entered pursuant to a plea bargain and *People v. West*, 3 Cal.3d 595 (1970), permitting petitioner under California law to deny commission of the crime while admitting there was sufficient evidence to convict him. In accord with the bargain, the prosecutor moved to strike the personal use of a deadly weapon enhancement allegation and to dismiss two additional felony charges of assault with a deadly weapon.

In the instant petition, petitioner alleges that Ms. Kops was constitutionally ineffective in failing to file a notice of appeal on his behalf after promising to do so.

This court ordered an evidentiary hearing to be held on the limited issue of the credibility of petitioner's assertions that Ms. Kops promised to file a notice of appeal on his behalf. The court appointed the Office of the Federal Defender to represent petitioner in connection with the evidentiary hearing.

The evidentiary hearing was held on January 24, 1997. Petitioner was represented by Assistant Federal Defender Ann H. Voris and respondent was represented by Paul E. O'Connor, Deputy Attorney General of the State of California. Testimony was received from petitioner, from Ms. Kops, and from Cheryl Sauceda, the certified court interpreter at both the change of plea hearing on October 13, 1993, and the sentencing hearing on November 10, 1993.

At the conclusion of the evidentiary hearing, this court noted on the record, "It is clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game."

This court made a factual finding that petitioner had not met his burden of proving by a preponderance of the evidence that Ms. Kops had promised to file a notice of appeal on his behalf. (Evidentiary hearing transcript, p. 75-76.)

This court further found that petitioner did not consent to Ms. Kops' failure to file a notice of appeal. (Evidentiary hearing transcript, p. 74.)

Counsel were asked to file post-hearing briefs addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), in light of the above factual findings. Post-hearing briefs on behalf of both parties were filed on March 14, 1997. Although the parties were granted until March 21, 1997, to file a response to the other party's post-hearing brief, no such responses were filed.

In *Stearns*, *supra*, Stearns pleaded guilty to bank robbery in the federal district court and was sentenced. He did not file an appeal, but two years later filed a habeas petition alleging that his attorney failed to file an appeal, as requested. Relying upon its earlier decisions in *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993) and *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), a state conviction, the Ninth Circuit reversed the

district court's denial of the petition holding that "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal. Of course, Stearns says that he did make a request, but he need only show that he did not consent to the failure to file." *United States v. Stearns*, *supra*, 68 F.3d at 330. The court further held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984) if it is established that counsel's failure to file a notice of appeal was without the Stearns' consent. [sic] *United States v. Stearns*, *supra*, 68 F.3d at 329.

The Stearns court also noted that cases from two other circuits had held that an attorney's failure to appeal after a guilty plea results in ineffective assistance of counsel without a specific showing of prejudice, citing to *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) and *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993). Regarding these cases, the *Stearns* court stated:

> The law applied in those cases was slightly different from the law of this circuit because in those cases the petitioner had requested that an appeal be filed, and counsel had not followed the request. *Castellanos*, at least, put much weight on the need for that request. 26 F.3d at 719. In doing so it relied on cases where a request was made after a trial, and stated that a "'[r]equest' is an important ingredient in this formula."

United States v. Stearns, *supra*, 68 F.3d at 330.

Noting that both *United States v. Horodner*, *supra*, and *Lozada v. Deeds*, *supra*, involved habeas petitions filed after convictions following trial, respondent argues that petitioner is not entitled to relief under *Stearns* because that case states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) and has no retroactive application. *Teague* held that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement. *Id.* at p. 310. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became

final." *Id.* at p. 301; *see also Penry v. Lynaugh*, 492 U.S. 302, 313, (1989).

The Supreme Court recently spelled out how *Teague* must be applied where the State argues that a petitioner seeks the benefit of a new rule of constitutional law:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of the new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bohlen, 510 U.S. 383, 389-390 (1994) (internal citations omitted).

In our present case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. California Rules of Court, rule 31(a). No notice of appeal was filed within that time and petitioner's conviction therefore became final on January 9, 1994.

The Ninth Circuits [sic] decision in *Teague* was filed on October 12, 1995.

Surveying the legal landscape of California as of January 9, 1994, a sentencing court was not required to advise a defendant of his appeal rights following a guilty plea. Cal. Rules of Court, rule 470. However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Pen.

Code, § 1240.1, subd. (a). Subdivision (b) of section 1240.1 provided in pertinent part:

> (b) It shall be the duty of every attorney representing an indigent defendant in any criminal . . . case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

In the present case, Ms. Kops was appointed to represent petitioner, an indigent, who entered a guilty plea to second degree murder. Ms Kops testified that in her opinion the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation and an appeal on that ground "would almost certainly fail." (Evidentiary hearing transcript, p. 43-44.) Ms. Kops also testified that while she would not have encouraged petitioner to file an appeal, had he asked her to do so she would

"still go ahead and file it." (Evidentiary hearing transcript, p. 49.)

It would appear, therefore, that Ms. Kops would have been under no statutory duty to file an appeal on behalf of petitioner under California law. No California or federal case law has been found holding, prior to the decision in *United States v. Stearns*, *supra*, 68 F.3d 328, that an attorney, either retained or appointed, had a duty to file a notice of appeal for a defendant following a guilty or no contest plea, absent a specific request by the defendant. In fact, federal cases specifically stated that an attorney had no duty to advise his or her client of the right to appeal following a guilty plea and, in the absence of a request, failure to file a timely notice of appeal after a guilty plea did not constitute ineffective assistance of counsel. *See, e.g., United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (and cases cited); *see also Belford v. United States*, 975 F.2d 310,

314 (7th Cir. 1992) (and cases cited); *Castellanos v. United States*, *supra*, 26 F.3d 717, 719; *Carey v. Leverette*, 605 F.2d 745, 746 (4th Cir. 1979) (despite a earlier contrary holding by the same circuit in *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969).

It seems clear under the "legal landscape as it then existed," no California court "would have felt compelled by existing precedent" to hold that in the absence of petitioner's consent, Ms. Kops' failure to file a timely notice of appeal constituted a denial of effective assistance of counsel. *See Caspari v. Bohlen*, *supra*, 510 U.S. at 390.

Turning to the third step of the analysis, it also seems clear that the "new rule" does not fall within either of the two narrow exceptions to the nonretroactivity principle. *Teague* held that a new rule may still be applied retroactively if it fits into one of two narrow exceptions. First, a new rule should be applied retroactively if it "places certain kinds of primary,

private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted). Or, as the Supreme Court further explained in *Sawyer v. Smith*, 497 U.S. 227 at page 241, the first exception "applies to new rules that place an entire category of primary conduct beyond the reach of a the criminal law [sic] . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, . . . The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." (citations omitted.)

Clearly, the new rule announced in *Stearns* would not fall within the first *Teague* exception.

As to the second exception, the *Sawyer* court further explained, "It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also, '"alter our understanding of the bedrock procedural elements"' essential to the fairness of the proceeding." *Sawyer v. Smith*, *supra*, 497 U.S. at 242. And, "As we stated in *Teague*, because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" 467 U.S. at 243.

The *Stearns* rule, that a defendant who does not consent to his attorney's failure to file a timely notice of appeal will be deemed to have received prejudicial ineffective assistance of counsel, would appear to have nothing to do with the accuracy of the trial nor would it alter the underlying procedural elements essential to the

fairness of the proceeding. At most, retroactive application of the *Stearns* rule to this case would allow petitioner to file a belated appeal in the state courts if the trial court would issue a certificate of probable cause for such an appeal pursuant to California Penal Code, section 1237.2.[1] [sic; 1237.5]

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus be DENIED.

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1. California Penal Code, section 1237.2 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following admission of violation, except where both the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

These findings and recommendations are submitted to the assigned District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Oilseed*, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 3, 1997

HOLLIS G. BEST
UNITED STATES MAGISTRATE JUDGE

ORIGINAL

No. 98-1441

In the

Supreme Court of the United States

October Term, 1998

ERNEST C. ROE, WARDEN,
Petitioner,

v.

LUCIO FLORES-ORTEGA
Respondent.

On Petition for Writ of Certiorari
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED

Should this court deny certiorari because the question of whether failure of counsel to file a notice of appeal without consent is long-established precedent, not barred by Teague v. Lane, 489 U.S. 288 (1989)?

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent, Lucio Flores-Ortega, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at Ortega v. Roe, 160 F.3d 534 (9th Cir. 1998) and attached to the Petition for Writ of Certiorari.

The issue, as framed by the Magistrate Judge, was whether United States v. Stearns, 68 F.3d 328 (9th Cir. 1995), required that the government show that Ortega did not consent to the non-filing of the appeal. The Magistrate Judge explained to the prosecutor that, under Stearns, "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal, rather than on whether counsel ignored an explicit request to file...He need only show that he did not consent to the failure to file." The evidence, the Magistrate Judge stated, is "quite clear that there was no consent to a failure to file."

On October 13, 1993, Lucio Flores-Ortega (Ortega) entered a plea of guilty to the charge of second degree murder in the Superior Court of California, County of Fresno, before the Honorable Dwayne Keyes. He was represented by the public defender. The plea was taken pursuant to People v. West, 3 Cal.3d 595 (1970) permitting him to deny the crime to the court under California law while admitting that there was sufficient evidence to convict him.

Ortega speaks no English. After a difficult plea, the public defender visited him with an interpreter before the sentencing. At some point, the lawyer noted, "bring appeal papers" on the presentence report. Ortega was sentenced on November 10, 1993 to a 15 year to life sentence.

In spite of the fact that the public defender noted in her file that she should "bring appeal papers", she did not file a Notice of Appeal. Within approximately four months, when he made

an inquiry, Ortega found out that his attorney had not filed an appeal.

On March 24, 1994, Ortega submitted a Notice of Appeal and Request for Certificate of Probable Cause. On April 8, 1994, the Fresno County Clerk of the Court refused to file the Notice, and referred him to the Court of Appeal. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. The basis for the denial, in spite of judicial policy protecting the right of appeal, was there were no grounds for appeal from this guilty plea. Essentially, the court ruled on the merits before permitting the filing of the Notice of Appeal.

A petition for writ of habeas corpus was filed with the California courts on June 3, 1994, and denied by the California Supreme Court on January 18, 1995. On July 27, 1995, Ortega timely filed a federal petition for habeas corpus. Counsel was appointed, and an evidentiary hearing was held before the Magistrate Judge.

Ortega's state lawyer testified at the evidentiary hearing that she reviewed the sentencing report with Ortega the day before sentencing. She still had her notes on the sentencing report, which included the notation "bring appeal papers." She testified that the notation, "bring appeal papers" meant that she was "giving herself a reminder to take appeal papers to court with her at sentencing." Counsel testified that she must not have done so, because the appeal was not filed.

Ortega's state attorney could not remember whether she and Ortega had discussed the appeal, though she conceded that she had probably written the notes to "bring appeal papers" on the day before court, and that she then forgot to bring said papers.

Ortega's attorney testified that she probably would have recommended against the appeal, but believed that ordinarily she probably would have filed an appeal if the client told her to do so. Here, the appeal was discussed, the client believed she was going to file an appeal even though

she advised against it, and the attorney failed to do so.

The Magistrate Judge held, and the district court affirmed, that Stearns was a new rule under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and that it should not apply to this case. The Ninth Circuit reversed and remanded, stating that reviewing the legal landscape at the time the conviction became final, Ortega did not rely on a new rule and the petition was not barred by Teague. The district court was instructed to issue a conditional writ releasing Ortega from custody unless the state trial court vacates and re-enters petitioner's judgment of conviction and allows a fresh appeal.

Petitioner argues that this court must state the exact rule or the precedent of the United States Circuit Court is inapplicable to the states. This question, however, does not arise in this case, because this court has already ruled upon this issue.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS RULED ON THIS ISSUE MANY TIMES OVER A THIRTY-YEAR PERIOD; THE HOLDING THAT IT IS INEFFECTIVE ASSISTANCE OF COUNSEL IF COUNSEL FAILS TO FILE A NOTICE OF APPEAL WITHOUT THE DEFENDANT'S CONSENT IS NOT A NEW RULE

A. There is no "explicit and substantial break with prior precedent" involved in this case.

Teague v. Lane, requires that when this court makes a ruling which is an "explicit and substantial break with prior precedent" it should only be applied prospectively. Teague, 489 U.S. at 294, 109 S.Ct. at 1066, 103 L.Ed.2d 334. The Teague court adopted the rule previously espoused by Justice Harlan which stated that the integrity of judicial review required application of a new rule to "all similar cases on direct review." Teague, 489 U.S. at 302, 109 S.Ct. at 1071,

103 L.Ed.2d 334.

Direct review and collateral review require different standards, so Teague requires that the court review the "legal landscape" at the time of the conviction in the state. The district court did that, and found that Stearns, 68 F.3d 328 (9th Cir. 1995) was a new rule which did not apply. The Ninth Circuit correctly held that Teague requires a three-step analysis:

> First, the court must determine the date on which the petitioner's conviction became final...Second, it must 'survey the legal landscape as it then existed,'... to 'determine whether a state court considering the petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the Constitution'...Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity. (Appendix A4, citations omitted).

The Ninth Circuit ruled that Stearns was not in the legal landscape at the time, but that, "Stearns tracks our opinion in Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction." The Ninth Circuit ruled that Stearns merely clarified that the rule in Lozada which was applicable to collateral review, also applied to direct review. (Appendix A5)

The Supreme Court has ruled on this issue. The defendant in Lozada v. Deeds, 498 U.S. 430, 431, 111 S.Ct. 860, 861, 112 L.Ed.2d 956 (1991) argued in a petition pursuant to 28 U.S.C. § 2254 that his attorney failed to inform him of his right to appeal and his right to counsel. Further, the attorney failed to file a notice of appeal, or to ensure appointment of counsel. Lozada, 498 U.S. at 431, 111 S.Ct. at 861, 112 L.Ed.2d 956 (1991). Lozada was remanded to the Ninth Circuit. The district court had dismissed the petition on the ground that no prejudice was shown, and there was no demonstration that the appeal would succeed -- the same grounds espoused by the state appellate court here. Lozada v. Deeds, 964 F.2d 956, 957 (9th Cir. 1992).

Petitioner argues that this court should state unequivocally that state courts do not have to follow circuit authority on Constitutional issues, that they need only follow Supreme Court authority.

B. This Case is Based on Thirty Years of Precedent

Justice Brennan discussed the right to petition for a writ of habeas corpus when there is not a knowing and intelligent waiver of the right to appeal in Fay v. Noia, 372 U.S. 391, 398, 83 S.Ct. 822, 827 (1969). The defendant, Noia, did not appeal, though the confessions of his codefendants were found to be coerced. The Supreme Court agreed that violation of his constitutional rights should be corrected by Writ of Habeas Corpus in spite of his failure to appeal because there was not an intelligent and understanding waiver of his right to appeal.

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of the state procedures, then it is open to the federal court on habeas to deny all relief. . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Fay v. Noia, 372 U.S. at 440, 83 S.Ct. at 849.

In a federal case on direct appeal, the Supreme Court indicated, in 1969, that an appeal from a District Court's judgment of conviction in a criminal case is a matter of right. Rodriguez v. United States, 395 U.S. 327, 329, 89 S.Ct. 1715, 1716 (1969). A criminal defendant is entitled to effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985).

"We hold that prejudice is presumed under Strickland [Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." Lozada v. Deeds, 964 F.2d 956, 958-959

(9th Cir. 1992). This was precedent. It was in existence at the time Ortega was convicted. This precedent came in a direct line, on remand from this court. Lozada v. Deeds, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). This court held, in a *per curiam* opinion that it was a violation of the Sixth Amendment when the attorney failed to file a notice of appeal and the District Court denied a Certificate of Probable Cause because there was no prejudice. Lozada, 498 U.S. at 432, 111 S.Ct. at 861, 112 L.Ed.2d, 956. An interesting point is made in Lozada, wherein this court stated,

> Since Strickland, at least two Courts of Appeals have presumed prejudice in this situation. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Circuit 1990); Estes v. United States, 883 F.2d 645, 649 (8th Circuit 1989); see also Rodriguez v. United States, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d 340 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in Estes, which had been decided before the Ninth Circuit issued its ruling.

Lozada v. Deeds, 498 U.S. at 432, 111 S.Ct. at 862, 112 L.Ed.2d 956 (1991).

This statement by this court does acknowledge, contrary to the petitioner Attorney General's theory, that the Ninth Circuit can review and analyze authority, and make decisions based on federal law and rulings. This court should not have to reiterate the same rule each decade in order to have the State of California follow the rule.

The Supreme Court, in Lozada v. Deeds, cited Abels v. Kaiser, 913 F.2d 821, 822 (10th Cir. 1990). Lozada, 498 U.S. at 432, 111 S.Ct. at 862. Abels v. Kaiser held that there was no requirement of showing prejudice citing Rodriguez v. United States, 395 U.S. 327, 330, 89 S.Ct. 1715, 23 L.Ed. 340 (1969) for the proposition that:

> Those whose right to appeal has been frustrated should be treated exactly like any other appellant; he should not be given an additional hurdle to clear just because the rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief

because of his failure to specify the points he would raise were his right to appeal reinstated.

There is no question in this case that the petitioner did not consent to the failure to file a notice of appeal. At the time of the conviction, 1993, Lozada v. Deeds was the law.[1/] Failure to file a notice of appeal is an error so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment, and the deficient performance prejudiced the defense. United States v. Stearns, 68 F.3d 328, 329 (9th Cir. 1995)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Abels also cited Riser v. Craven, 501 F.2d 381 (9th Cir. 1974). Apparently, in 1974, in this same district, the State of California was making the same argument it is making again twenty-five years later. Riser stated a prima facie case for relief under Rodriguez, Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969) and Sanders v. Craven, 488 F.2d 478 (9th cir. 1973), except that there was an intervening 9th Circuit opinion wherein the circuit court stated, as the Attorney General believes today, that Rodriguez "is not necessarily applicable on federal habeas corpus review of state convictions." Riser, 501 F.2d at 382. In order to clear up any discrepancy, the court specifically and expressly overruled the case making that statement in Buster v. Hocker, 428 F.2d 820 (9th Cir. 1970). Riser, 501 F.2d at 382. The final ruling in Riser was that, "If the district court decides that Riser was deprived of the effect assistance of counsel, then as in Sanders, 'it should give the California Courts the opportunity to allow the appeal and pass on the substance' of his other claims of error. (Sanders v. Craven, supra, 488 F.2d at 480)" Riser, 501 F.2d at 382.

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1. In Footnote 5, the Attorney General stated that 9th Circuit Lozada was not based on any Supreme Court precedent.

In the sixties this court said defendants in the state or federal system needed to be informed of their right to appeal and their right to counsel on appeal; in the seventies, the 9th Circuit clarified that right; in the eighties, this court made clear the standards of ineffective assistance of counsel; in the nineties it was reiterated that deprivation of appellate rights denied effective assistance of counsel. This is no "new rule". It is not a new rule as applied. The Supreme Court should not have to grant certiorari every time a potentially new set of facts arises.

Historically, from Fay v. Noia to the present, the cases are a seamless line requiring lawyers to advise their clients of their appellate rights, and to preserve those rights if the client does not consent to waiver. In this case, counsel apparently advised Ortega of his rights, and wrote, "bring appeal papers" on his pre-sentence report. She did not, however, preserve those rights. The Magistrate Judge held that Ortega did not consent to the failure to file the notice of appeal. This is not a new rule.

The Ninth Circuit on remand followed the instructions of the United States Supreme Court, holding that prejudice was presumed because counsel on appeal was denied altogether under Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Lozada was remanded to the district court for a determination of whether the waiver of appeal was without the consent of the defendant. In our case, the Magistrate Judge has already made that finding.

Here, the Ninth Circuit Court followed United States v. Stearns, 68 F.3d 328 (9th Cir. 1995), which followed the Ninth Circuit Lozada, which followed the Supreme Court Lozada, which followed Strickland and Rodriguez. The rather interesting, yet backwards argument that the state need not follow circuit precedent ignores the fact that the Ninth Circuit cannot overrule

the Supreme Court. A new rule, by any definition, is made by the Supreme Court. If the Ninth Circuit incorrectly interprets the case law, then that may be grounds for review, but it is not creating a new rule barred by Teague.

C. There is no Teague Bar in This Case, There is no New Rule

Teague discusses federal courts making new rules; but says they are not prospectively barred unless the court announces a new rule which is not based on precedent. The state can argue that a rule is a misstatement of the law, or not, but under its own argument, it is not a new rule barred by Teague unless the Supreme Court announces it. Here, the California court did not permit the late filing of a Notice of Appeal when Ortega determined that the Notice had not been filed. In spite of state rules of court to the contrary, and a presumption in favor of filing, the state appellate court also denied the right to file a notice of appeal.

California courts did not consider the Constitutional Sixth Amendment argument at hand, which is that Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires filing a notice of appeal unless the client consents to the non-filing. United States v. Stearns, 68 F.3d 328 (9th Cir. 1995). It is not a complicated rule, or a difficult rule, and it was based on precedent in existence at the time, including Supreme Court precedent from 1963.

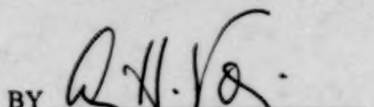
Here, Ortega was told that he had the right to appeal, and believed his attorney was filing a notice of appeal. She did not. She should have. There was no error in reversal.

CONCLUSION

The Ninth circuit correctly upheld precedent requiring counsel to inform defendants of appeal rights and to preserve those rights if they are not waived. Petition for Writ of Certiorari should be denied.

Dated: March 31, 1999

QUIN DENVIR
Federal Defender

BY 

ANN H. VORIS*
Assistant Federal Defender
Attorney for Respondent
Lucio Flores-Ortega

*Counsel of Record

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN,

Petitioner,

v.

LUCIO FLORES ORTEGA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On March 31, 1999, he/she personally served a copy of the attached:

RESPONDENT'S BRIEF IN OPPOSITION

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Fresno, California, as follows:

PAUL EDWARD O'CONNOR
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
STATE OF CALIFORNIA
1300 I STREET, SUITE 125
P. O. Box 944255
SACRAMENTO, CA 94244-2550

Dated: March 31, 1999

DELIA C. RIVERA

OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
2300 TULARE STREET, SUITE 330
FRESNO, CALIFORNIA 93721-2226
(209) 487-5561 Fax: (209) 487-5950

Quin Denvir
Federal Defender

Dennis S. Waks
Chief Assistant Defender

Marc C. Ament
Fresno Branch Chief

March 31, 1999

Clerk of the Court
U.S. Supreme Court
1 First Street, N.E.,
Washington, D.C. 20543

Re: *Ernest C. Roe, Warden, v. Lucio Flores-Ortega*
Case No. 98-1441

Dear Clerk of the Court:

Enclosed please find an original and 13 copies of Respondent's Brief in Opposition, along with Respondent's Motion to File Opposition Brief in Forma Pauperis, in the above entitled case. Please return a conformed copy in the self-addressed stamped envelope that is provided.

I am available to answer any questions in this regard. Thank you for your attention to this request.

Sincerely,

ANN H. VORIS
Assistant Federal Defender

AHV:dcr

cc: Paul Edward O'Connor,
Deputy Attorney General

(3)

No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
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10PP

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1441

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ARGUMENT

I.

THE CASES CITED BY RESPONDENT ARE INAPPOSITE: THEY INVOLVE CONVICTIONS AFTER TRIAL, OR REQUIRE THAT A DEFENDANT ASK FOR AN APPEAL OR THAT TRIAL COUNSEL KNOW OF DEFENDANT'S DESIRE TO APPEAL

Respondent essentially claims the rule of *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), is not a "new rule" but is supported by long-established precedent. (Respondent's Brief in Opposition ["Opp'n Br."] at i, 1, 3-8.) Respondent cites numerous cases which purportedly support this position. In fact, the cases cited by Respondent are inapposite: frequently they are distinguishable because they involve convictions after trial as opposed to convictions after guilty plea; or they require that the defendant ask for an appeal or that trial counsel know of defendant's desire to appeal. *Stearns* was a guilty plea case which required only that petitioner show that he did not consent to counsel's failure to file a notice of appeal. 68 F.3d at 329, 330. Thus, *Stearns*, which was decided after Respondent's case became final, is a "new rule" barred by *Teague v. Lane*, 489 U.S. 288 (1989).

The distinction between conviction after trial and conviction after guilty plea is important because in California a guilty plea admits all matters essential to the conviction. (Petition for Writ of Certiorari at 22-23 [hereafter "Pet."].) Indeed, California generally requires a certificate of probable cause to appeal from a judgment following a guilty plea. (Pet. at 23.)

Many of the cases cited in Respondent's brief involved convictions by trial as opposed to convictions by guilty plea. Such cases include: *Fay v. Noia*, 372 U.S. 391, 394-95, 396 n.2 (1969);[1] *see also United States ex rel. Noia v. Fay*, 300 F.2d 345, 347 (2d Cir. 1962); *Rodriquez v. United States*, 395 U.S. 327, 328, 331 & n.3 (1969);[2] *see also Rodriquez v. United States*, 387 F.2d 117 (9th Cir. 1967); *Evitts v. Lucey*, 469 U.S. 387, 389 (1985); *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992) (*see Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994));[3] *Lozada v. Deeds*, 498 U.S. 430 (1991); and *Gairson v. Cupp*, 415 F.2d 352 (9th Cir. 1969). These cases are inapposite.

Some of the cases cited by Respondent require that a defendant request an appeal. *Abels v. Kaiser*, 913 F.2d 821 (10th Cir. 1990) is a guilty plea case. *Id.* at 822. However, as noted in the Petition for Writ of Certiorari, *Abels* requires that a defendant *ask* his/her attorney to file a notice of appeal. (Pet. at 18-19; *see also Abels*, 913 F.2d at 823 [". . . a defendant is denied effective assistance of counsel if he asks his lawyer to perfect an appeal and the lawyer fails to do so . . . ."; "Abels . . . had every right to expect that his counsel would follow his instructions in perfecting the appeal."].)

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1. Moreover, *Fay's* "deliberate bypass" standard has been overruled. *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991).

2. Indeed, *Rodriquez* cites a rule regarding appeal right advisements after trial. *Rodriquez*, 395 U.S. at 331 n.3. Further, *Rodriquez* is distinguishable for the additional reason that it was a habeas action by a *federal* prisoner. *Id.* at 328. No issue of federalism was involved (i.e., whether state courts can be bound by federal circuit courts).

3. Petitioner has previously noted that *Lozada* is distinguishable on this basis. (Pet. at 22-23.)

Likewise, *Estes v. United States*, 883 F.2d 645 (8th Cir. 1989) was a guilty plea case. *Id.* at 646-47. However, *Estes* followed the rule that an attorney's failure to file a notice of appeal, when so *instructed* by the client, constitutes ineffective assistance. *Id.* at 648-49. Further, *Estes* remanded for a hearing on whether the defendant asked his attorney to file an appeal. *Id.* at 649.[4]

In the present case, the District Court found that had Respondent requested that trial counsel file a notice of appeal, she would have done so. (Pet. at 21-22, citing Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 76 [Magistrate Judge's finding].)[5] Thus, because Respondent did not request the filing of a notice of appeal, *Abels* and *Estes* are inapposite.

Further, some of the cases cited by Respondent require that the trial attorney *know* of the defendant's desire to appeal. It is not clear whether *Riser v. Craven*, 501 F.2d 381 (9th Cir. 1974) was a guilty plea case or a trial case. However, *Riser* states a rule different from that articulated in *Stearns*, the rule at issue in the present case. In *Riser* the court stated that counsel's failure to protect a defendant's appeal rights is ineffective assistance when the attorney *knows* his client may want to appeal. *Riser*, 501 F.2d at 382.[6] Accordingly, the *Riser* court remanded the matter to determine, inter alia, whether counsel knew that defendant wanted to appeal. *Id.* at 382.

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4. *Estes* is also distinguishable because it was a habeas action by a federal prisoner. *Estes*, 883 F.2d at 647.

5. In light of this finding, it is clear that the notation on trial counsel's presentence report, "bring appeal papers," does not mean that Respondent requested an appeal.

6. On this point, *Riser*, 501 F.2d at 382, followed *Gairson v. Cupp*, 415 F.2d 352, and *Sanders v. Craven*, 488 F.2d 478 (9th Cir. 1973), discussed *post*.

By contrast, the rule articulated in *Stearns*, 68 F.3d at 330, is that even in a guilty plea case, a prisoner may obtain habeas relief merely by showing that he did not consent to counsel's failure to file a notice of appeal.[7] Thus, in *Stearns* there is no requirement that counsel know that the defendant wanted or might have wanted to appeal. Consequently, *Stearns* states a rule different from *Riser*.

Sanders v. Craven, 488 F.2d 478, was a guilty plea case. *Id.* at 479. But *Sanders* followed the rule in *Gairson*, 415 F.2d at 353 (a trial case [*id.* at 352]), that where an attorney *knows* his/her client wants to appeal (and other conditions are met) he/she has a duty to protect his/her client's appeal rights (by filing a notice of appeal or telling the client how to proceed). Applying this rule, the *Sanders* court remanded, stating that the district court would be interested in evidence regarding the attorney's awareness of defendant's desire to appeal. *Sanders*, 488 F.2d at 480.[8]

Again, the *Sanders-Gairson* rule is different from the *Stearns* rule which requires the petitioner to show only that he did not consent to the failure to file a notice of appeal. *Stearns*, 68 F.3d at 330.

Thus, the cases cited by Respondent do not assist him. They are frequently distinguishable because they involved convictions by trial rather than by guilty plea. Or they are inapposite because they stated rules different from *Stearns*: requiring a defendant's request for an

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7. *Stearns* is also distinguishable because it was a habeas action by a federal prisoner. (Pet. at 23.)

8. It is worth noting that in *Sanders* the underlying issue, a Fourth Amendment claim, was appealable despite the guilty plea. *Sanders*, 488 F.2d at 480. In the present case, there do not appear to have been any arguably meritorious appellate issues. (Pet. at 21.) This supports the conclusion that a reasonable attorney would not have been aware of Respondent's purported desire to appeal.

appeal or an attorney's knowledge that an appeal was desired. Thus, *Stearns* is a new rule barred by *Teague*.

Because *Stearns* is a new rule, which improperly relied on prior Ninth Circuit precedent in *Lozada*, 964 F.2d 956, this Court may reach the first question presented in Petitioner's Petition for Writ of Certiorari, namely, whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is "dictated by precedent" within the meaning of *Teague*.

II.

RESPONDENT SEEMS TO ACKNOWLEDGE THAT UNITED STATES SUPREME COURT AUTHORITY CONTROLS FOR *TEAGUE* PURPOSES; THIS COURT'S *LOZADA* DECISION IS INAPPOSITE

Respondent seems to agree that only United States Supreme Court precedent controls for *Teague* purposes. ("A new rule, by any definition, is made by the Supreme Court . . . . [¶] . . . The state can argue that a rule is a misstatement of the law, or not, but under its own argument, it is not a new rule barred by *Teague* unless the Supreme Court announces it." [Opp'n Br. at 9.]) Unfortunately, the Ninth Circuit does not seem to agree. In *Stearns*, the Ninth Circuit announced a new rule not based on United States Supreme Court precedent. The Ninth Circuit's response to Petitioner's *Teague* argument was that *Stearns* was based on the Ninth Circuit's decision in *Lozada*, 964 F.2d 956. (Pet., App. A at 5.) This underscores the need for this Court to grant certiorari on the question of whether United States Supreme Court authority alone is controlling precedent for *Teague* purposes.

Further, this Court's *Lozada* decision (498 U.S. 430) is not contrary to Petitioner's position.[9] This

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9. Referring to the failure to perfect an appeal, this Court stated in *Lozada*:

> Since *Strickland*, at least two Courts of Appeals have presumed prejudice in this situation. *See Abels v. Kaiser*, 913 F.2d 821, 823 (CA10 1990); *Estes v. United States*, 883 F.2d 645, 649 (CA8 1989); *see also Rodriquez v. United States*, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d

Court's *Lozada* decision impliedly adopted the presumed prejudice rule of *Abels* and *Estes*; however, this Court's *Lozada* decision does not suggest that circuit courts should always look to sister circuits to determine whether a rule is dictated by precedent within the meaning of *Teague*. Indeed, this Court's *Lozada* decision does not address *Teague*. It is therefore inapposite.

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340 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in *Estes*, which had been decided before the Ninth Circuit issued its ruling.

Lozada, 498 U.S. at 432. Petitioner has previously distinguished *Lozada*, *Abels*, and *Estes*.

CONCLUSION

Thus, the cases cited by Respondent are inapposite. The Petition for Writ of Certiorari should be granted.

Dated: April 14, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
ARNOLD O. OVEROYE
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General

Paul E. O'Connor

PAUL E. O'CONNOR
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, Warden, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 4, 1999
Certiorari Granted May 3, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1441

ERNEST C. ROE, Warden, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

DOCKET ENTRIES
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA
petitioner

v.

ERNEST C ROE
respondent

ATTORNEY GENERAL CA
respondent

DATE NR. PROCEEDINGS

7/27/95 1 PETITION FOR WRIT OF HABEAS CORPUS to Magistrate Judge Hollis G. Best (tb)

7/27/95 2 MOTION to proceed in forma pauperis by petitioner (tb)

7/27/95 3 MOTION for appointment of guardian ad litem by petitioner (tb)

7/27/95 4 NOTICE regarding case number and local rules (tb)

9/26/95 5 ORDER by Magistrate Best DENYING motion for appointment of guardian ad litem by petitioner [3-1], GRANTING motion to proceed in forma pauperis by petitioner [2-1]; directing service and returning documents case mgmt ddl set for 10/26/95 to respond to petition (cc: all counsel) (tb)

11/13/95 6 ORDER by Magistrate Judge Hollis G. Best case mgmt ddl set for 11/27/95 for respondents to file a response to petition (cc: all counsel) (lm)

11/17/95 7 ANSWER by respondent Ernest C Roe (rm) [Entry date 11/20/95]

11/17/95 8 NOTICE by Ernest C Roe of lodging documents (rm) [Entry date 11/20/95]

11/17/95 -- LODGED state record by Ernest C Roe (rm) [Entry date 11/20/95]

11/22/95 9 PROOF OF SERVICE by respondents of [8-1] (rm) [Entry date 11/27/95]

11/22/95 10 PROOF OF SERVICE by respondents of [7-1] (rm) [Entry date 11/27/95]

11/27/95 11 NOTICE OF LODGING OF DECLARATION of Nancy Kops (rm) [Entry date 11/28/95]

7/12/96 12 ORDER by Judge Best appoints Federal Defender to represent petitioner; contents of file to be copied and sent to Federal Defender; evidentiary hearing set for 10:00 11/1/96; case mgmt ddl set for 8/15/96 for objections to evidentiary hearing (cc: all counsel) (dg) [Entry date 07/15/96]

7/29/96 13 ATTORNEY APPEARANCE for petitioner by Ann Hardgrove Voris (rm) [Entry date 07/30/96]

10/9/96 14 ORDER by Magistrate Judge Best for issuance of a writ of habeas corpus ad testificandum (cc: all counsel) (pp) [Entry date 10/10/96]

10/9/96 15 WRIT issued to produce Lucio Flores Ortega (pp) [Entry date 10/10/96]

10/28/96 -- LODGED stipulation/order to continue evidentiary hearing by respondents (rm) [Entry date 10/29/96]

11/1/96 16 STIPULATION AND ORDER by Magistrate Judge Hollis G. Best to continue evidentiary hearing set for 10:30 1/24/97 before Judge Best (cc: all counsel) (rm) [Entry date 11/04/96]

12/27/96 17 MOTION for a writ of habeas corpus ad testificandum by Lucio Flores Ortega Motion Hearing Set for 1/24/97 10:30 (rm) [Entry date 12/30/96]

12/27/96 -- LODGED order re writ of habeas corpus ad testificandum by Lucio Flores Ortega (rm) [Entry date 12/30/96]

1/6/97 18 ORDER by Magistrate Judge Hollis G. Best to issue writ of habeas corpus ad testificandum as to Lucio Ortega (cc: all counsel) (rm) [Entry date 01/07/97]

1/7/97 -- WRIT of habeas corpus ad testificandum issued as to Lucio Ortega (rm)

1/10/97 19 PRE-HEARING BRIEF by respondent Ernest C Roe and Attorney General CA (hl) [Entry date 01/13/97]

1/24/97 20 EXHIBIT AND WITNESS list (mh) [Entry date 01/27/97]

1/24/97 21 DECLARATION of Cheryl Sauceda (mh) [Entry date 01/27/97]

1/24/97 22 MINUTES of 1/24/97 before Magistrate Judge Best briefs due 3/14/97 C/R G. Gibson (mh) [Entry date 01/27/97] [Edit date 01/27/97]

2/5/97 23 TRANSCRIPT of proceedings on 1/24/97 re: evidentiary hearing by C/R Dorothy Gibson (mh) [Entry date 02/06/97]

3/14/97 24 POST-HEARING BRIEF by petitioner (rm) [Entry date 03/17/97]

3/14/97 25 CJA 24 authorization and voucher for payment of transcript For petitioner (rm) [Entry date 03/17/97]

3/14/97 26 POST-HEARING BRIEF by respondent (rm) [Entry date 03/17/97]

4/3/97 27 FINDINGS AND RECOMMENDATIONS by Magistrate Judge Hollis G. Best Recommending dismissal of motion for a writ of habeas corpus ad testificandum by Lucio Flores Ortega [17-1] REFERRED to Judge Garland E. Burrell Case Mgmt Ddl set for 5/5/97 file objections (cc: all counsel) (il)

5/2/97 28 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [27-1] by petitioner Lucio Flores Ortega (cc) [Entry date 05/06/97]

5/19/97 29 REPLY by respondent to petitioner's objections [28-1] (mh) [Entry date 05/20/97]

6/18/97 -- MAIL to Sacramento Office case file in one vol docs 1-19 to GEb chambers for order re FRs (tb)

6/30/97 30 ORDER by Judge Garland E. Burrell ORDERING Findings & Recommendation order [27-1] ADOPTED, habeas corpus petition [1-1] DENIED dismissing case (cc: all counsel) (kdc)

6/30/97 31 JUDGMENT issued in accordance with the court's order of 6/30/97 (cc: all counsel) (kdc)

7/10/97 -- MAIL to Fresno Office: 1 volume, documents 1 -29 (kdc)

7/16/97 32 NOTICE OF APPEAL by petitioner Lucio Flores Ortega from District Court decision (fee status IFP) (hl) [Entry date 07/17/97]

8/5/97 33 TRANSCRIPT DESIGNATION and Ordering Form for dates 1/24/97 appeal [32-1] regarding evidentiary hearing transcript [23-1] (mh) [Entry date 08/06/97]

8/18/97 34 CERTIFICATE OF RECORD transmitted to 9th Circuit [32-1] (notice sent) (hl)

8/27/97 -- MAIL to Sacramento Office of 1 volume documents 1 thru 34 (hl) [Edit date 10/02/97]

10/6/97 35 REQUEST by petitioner Lucio Flores Ortega for certificate of probable cause (lh) [Entry date 10/07/97]

10/10/97 36 ORDER by Judge Garland E. Burrell ORDERING request [35-1] for certificate of probable cause ISSUED (cc: all counsel) (gk)

10/20/97 37 MAIL returned [25-1] addressed to petitioner Lucio Flores Ortega (kdc) [Entry date 10/21/97]

10/23/97 38 MAILED case information/docket fee payment notice copy of Notice of Appeal and appealed 6/30/97 judgment to 9th Circuit Court of Appeals copy of appeal and certified copy of docket sheet to all parties (lm)

10/30/97 39 MAIL returned/ notification of appeal [38-1] addressed to petitioner Lucio Flores Ortega [envelope indicates return to sender, not at CSP-LAC] (cc) [Entry date 10/31/97]

8/25/98 40 CLERK'S record on appeal transmitted to 9th Circuit original case file volumes 1 transcripts 1 and certified copy of docket mailed to 9th Circuit regarding appeal [32-1] (cc: all counsel) (hl) [Entry date 08/26/98]

9/30/98 41 LETTER to court from counsel for respondents Ernest C Roe, Attorney General CA re appeal (il) [Entry date 10/01/98]

10/2/98 42 COPY OF SUPPLEMENTAL AUTHORITY sent to the 9th Circuit by respondent re Argument E (dld) [Entry date 10/05/98]

11/9/98 43 REQUEST for clerk's record to be returned from the Ninth Circuit Court of Appeals (il) [Entry date 11/10/98]

11/18/98 44 STATEMENT of counsel sent to USDC by the Ninth Circuit (ls) [Entry date 11/20/98]

11/23/98 45 RECORD on appeal returned from 9th Circuit volumes 1 transcripts 1 (mm) [Entry date 11/24/98]

2/8/99 46 CERTIFIED COPY of judgment from 9th Circuit the Decision of the District Court [Appeal

[32-1]] REVERSED and REMANDED (cc: all counsel) (jv) [Entry date 02/10/99]

3/1/99 47 ORDER by Judge Anthony W. Ishii ORDERING Case REASSIGNED to Judge Anthony W. Ishii (cc: all counsel) (mh) [Entry date 03/02/99]

3/1/99 48 ORDER by Judge Anthony W. Ishii ORDER granting conditional writ case mgmt ddl set for 6/1/99 (cc: all counsel) (mh) [Entry date 03/02/99]

3/3/99 49 Order from Circuit Court pursuant to the Supreme Court's order dated 2/8/99, the mandate in the above matter is hereby recalled; The mandate will remain stayed pending further order of the Supreme Court (mh) [Entry date 03/04/99]

3/11/99 50 MAIL returned [47-2] addressed to petitioner Lucio Flores Ortega (Envelope indicates return to sender/Not at CSP-LAC) (mh) [Entry date 03/12/99]

3/12/99 51 REQUEST by respondent for court to stay order of 3/1/99 (ls) [Entry date 03/15/99]

3/12/99 52 PROOF OF SERVICE by respondent of [51-1] (ls) [Entry date 03/15/99]

3/19/99 53 ORDER by Judge Ishii ORDERING request to stay action [51-1] GRANTED Court stays conditional writ issued on 3/1/99 pending further order of the Ninth Circuit or a ruling on a properly filed and noticed motion (cc: all counsel) (rab) [Entry date 03/22/99]

3/19/99 54 NOTICE by respondent Attorney General CA regarding copy of order from the Ninth

Circuit denying rehearing of the petition (rab) [Entry date 03/22/99]

3/29/99 55 MAIL returned Re Order Staying Action [53-1], [53-2] addressed to petitioner Lucio Flores Ortega (Petitioner not at CSP-LAC) (rab) [Entry date 03/30/99]

5/18/99 56 NOTICE regarding State Court proceedings (sr) [Entry date 05/19/99]

5/24/99 57 NOTICE: from Fresno County Superior Court of motion for reconsideration before Judge Keyes granted and Order of 5/12/99 vacated (tw) [Entry date 05/25/99]

DOCKET ENTRIES
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA
Petitioner - Appellant

No. 97-17232

v.

ERNEST C. ROE, Warden
Respondent - Appellee

Docket as of June 2, 1999 11:21 pm

12/3/97 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 7/28/97; appellee's designation of RT is due 8/5/97; appellant shall order transcript by 8/15/97; court reporter shall file transcript in DC by 9/15/97, ; certificate of record shall be filed by 9/22/97 ; appellant's opening brief is due 1/7/98; appellees' brief is due 2/6/98; appellants' reply brief is due 2/20/98; [97-17232] (ft)

12/31/97 Filed order (Deputy Clerk: wp) The opening brief is due 2/9/98 the answering brief is due 3/9/98 the reply brief is due 14 days after service of the aples brief. [97-17232] (wp)

2/9/98 14 day oral extension by phone of time to file Appellant brief. [97-17232] appellants' brief due 2/23/98; appellees' brief due 3/25/98; the optional reply is due 14 days from service of the answering brief. (cg)

2/23/98 Filed original and 15 copies aplt's opening brief of 16-pgs with cert of compliance; and 5 excerpts of record; served on 2/20/98. (Informal: no) [97-17232] (rc)

3/25/98 Filed original and 15 copies aple's answering brief of 23-pgs with cert of compliance; and 5 supp'l excerpts of record; served on 3/23/98. [97-17232] (rc)

3/25/98 Filed aple's pre-sentencing report UNDER SEAL. (RECORDS)
[97-17232] (rc)

6/26/98 Calendar check performed [97-17232] (aw)

7/30/98 Calendar materials being prepared. [97-17232] [97-17232] (uk)

7/31/98 CALENDARED: SF 10/5/98 1:30 pm Courtroom 3 [97-17232] (uk)

9/29/98 Filed order (Deputy Clerk for Court: GB) the court is of the unanimous opinion that the facts and legal arguments are adequately presented in briefs & record. . . . FRAP 34 and 9th Cir. R. 34-4. Accordingly, this case shall be submitted on the briefs and record, w/out oral argument, on October 5, 1998, in SF, CA. (phoned counsel) [97-17232] (db)

9/29/98 Rec'd ltr dtd 9/28/98 from counsel for aple, re: additional citations -- citing Morales v. United States, 143 F.3d 94, 96-97 (2d Cir 1998), and Fernandez v. United States, 146 F.3d 148, 148-49 (2d Cir. 1998). Deficient -- does not comply with provisions of FRAP 28(j) regarding reference to page or argument point(s) in brief. Counsel notified to submit corrected 28(j) letter. (faxed to panel) [97-17232] (db)

10/1/98 Rec'd ltr dtd 9/30/98, re: corrected additional citations (informing court the applicability of the two cases cited to the page reference in aple's brief) (faxed to panel) [97-17232] (db)

10/5/98 SUBMITTED ON THE BRIEFS TO: Robert R. BEEZER, Cynthia H. HALL, Pamela A. RYMER [97-17232] (mlm)

11/2/98 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Submission Without Oral Hearing; Reversed; Written, Signed, Published. Robert R. BEEZER, author; Cynthia H. HALL; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [97-17232] (db)

11/16/98 [3565182] Filed original and 40 copies Appellee Ernest C. Roe petition for rehearing with suggestion for rehearing en banc in 15 pages served on 11/13/98. (PANEL and all active judges) [97-17232] (lp)

11/17/98 Received Appellee Ernest C. Roe's (Statement of Counsel) addendum to Respondent's Petition for Rehearing, served on 11/16/98 (PANEL-all active judges) [97-17232] (lp)

11/30/98 Filed Ernest C. Roe additional citations, served on 11/23/98. (PANEL and all active judges) [97-17232] (lp)

12/11/98 Filed order (Robert R. BEEZER, Cynthia H. HALL, Pamela A. RYMER).....the petition for rehearing is DENIED and the suggestion for rehearing en banc is rejected. (FOR COMPLETE SEE ORDER) [3565182-1] [97-17232] (rc)

12/17/98 Filed aple's mtn for stay of issuance of mandate and declaration in support of mtn to stay mandate for time to file a petition to the Supreme Ct for a writ of certiorari; served on 12/16/98. (AUT) [97-17232] [3587657] (rc)

1/14/99 Filed order (Robert R. BEEZER): Aplt's motion for stay of mandate for time to file a petition for writ of cert, filed with this court on 12/17/98, is DENIED. [97-17232] (ft)

2/4/99 MANDATE ISSUED [97-17232] (lp)

2/8/99 Filed Supreme Court order (SC Date: 2/8/99) upon consideration of the application of csl for the applicant. It is ordered that the mandate of the USCA for the 9th Cir., case No. 97-17232 is stayed pending receipt of a response, due on or before 2/15/99, and further order of the undersigned or of the CT. (AUT) [97-17232] (rc)

3/1/99 Filed order (Robert R. BEEZER,): Pursuant to the Supreme Court's order dated 2/8/99, the mandate in the above matter is hereby recalled. The mandate will remain stayed pending further order of the Supreme Court. [97-17232] (lp)

3/3/99 Received "fax" from Ann Hardgrove Voris for Appellant Lucio Flores Ortega with attached letter and order from the Supreme Crt. re: application to stay mandate is denied (faxed to PANEL) [97-17232] (lp)

3/4/99 Filed Ernest C. Roe motion for 3/1/99 Order to remain in effect pending certiorari proceedings; served on 3/3/99. (faxed to PANEL) [97-17232] [3640136] (lp)

3/11/99 Received copy of letter from Paul Edward O'Connor for Appellee Ernest C. Roe to District Court dated 3/10/99 re: request that Court stay Order granting conditional writ. (faxed to PANEL) [97-17232] (lp)

3/12/99 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-1441 filed on 3/4/99. Placed on the docket 3/10/99. [97-17232] (lp)

3/19/99 Received copy of letter from Paul Edward O'Connor for Appellee Ernest C. Roe to Superior Court dated 3/17/99 re: attached Order granting Conditional Writ. [97-17232] (lp)

3/23/99 Received fax from Ann Hardgrove Voris for Appellant Lucio Flores Ortega re: attached District Court Order staying action. (PANEL) [97-17232] (lp)

4/20/99 Received copy of Reply to Brief in Opposition (CASEFILE) [97-17232] (lp)

5/13/99 Received letter from the Supreme Court dated 5/3/99 re: the ct today entered the following order in the above entitled cases. The mtn of respondent for leave to proceed ifp is GRANTED. The petition for a writ of certiorari is GRANTED LIMITED to Question 2 presented by the petition. [97-17232] (rc)

5/25/99 Filed Ernest C. Roe unopposed motion to stay the mandate; served on 5/24/99. (faxed to Author) [97-17232] [3681692] (lp)

5/28/99 Filed Appellant Lucio Flores Ortega's non-opposition to Motion for Stay of Mandate; served on 5/24/99. (faxed to Author) [97-17232] (lp)

REPORTER'S TRANSCRIPT
CHANGE OF PLEA (ENTRY OF GUILTY PLEA)
OCTOBER 13, 1993

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

Before the Honorable Dwayne Keyes, Judge
Department 1
-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA, No. 490730-9

Plaintiff,

vs. REPORTER'S TRANSCRIPT

LUCIO ORTEGA FLORES,
Defendant. CHANGE OF PLEA

-o0o-

Fresno, California October 13, 1993

-o0o-

APPEARANCES:

FOR THE PEOPLE: EDWARD W. HUNT,
District Attorney of the County of Fresno
BY: MICHELE E. GRIGGS
Deputy District Attorney

FOR THE DEFENDANT: JOSE VILLARREAL,
Public Defender of The County of Fresno
BY: NANCY KOPS
Chief Defense Attorney

INTERPRETER: CHERYL SAUCEDA

-o0o-

Reported by:
VALERIE ELIZABETH FAUST, C.S.R., R.P.R.
CERTIFICATE NO. 4922

[START TRANSCRIPT - PAGE 2, LINE 1]
WEDNESDAY, OCTOBER 13, 1993 - AFTERNOON SESSION

(The following proceedings were had in open court in the presence of the Court, Counsel, defendant and the interpreter:)

THE BAILIFF: Please come to order. Superior Court, Department 1 is now in session.

THE COURT: All right. We are again on the record in Action 490730-9, People of the State of California vs. Lucio Ortego Flores.

Mr. Flores, it's my understanding that you wish to change your plea of not guilty to guilty; is that correct?

THE DEFENDANT: How is that?

THE COURT: You wish to change your plea from not guilty to guilty?

THE DEFENDANT: To plead guilty?

THE COURT: Yes.

THE DEFENDANT: Guilty of what?

THE COURT: You have talked to your attorney. You understand why we are here now. Do you wish to change your plea from guilty — from not guilty to guilty?

THE DEFENDANT: Well, I filled out a sheet. I thought that — I think that I signed that to plead guilty.

THE COURT: That is correct. I have to ask you questions in addition to that sheet.

Do you wish to change your plea from not guilty to guilty?

[TR. 3]

THE DEFENDANT: I wanted to change my pleas, but when I was asking the judge, I have a letter here for the judge asking him to give me a bilingual public defender.

THE COURT: I have already told you, you will not get a bilingual defender.

Do you wish to change your plea from guilty to not — pardon me — from not guilty to guilty?

THE DEFENDANT: Well, I already explained to the attorney that although I am not guilty, I have to plead guilty.

THE COURT: Is your answer yes?

THE DEFENDANT: Yes.

MS. KOPS: Your Honor, just for the record, when talking to Mr. Flores this morning, I did explain that he had a choice of whether to plead guilty or to have a jury trial, but I couldn't force him, and nobody could force him, to plead guilty, so that he did not have to plead guilty.

THE COURT: All right. Mr. Flores, we have a jury waiting downstairs to come up and hear this case. And you have a right to a speedy and public trial. Do you understand you have that right?

THE DEFENDANT: Yes, I have the right, but —

THE COURT: Go ahead.

THE DEFENDANT: I have the right, but I can't decide it because I do not have sufficient people to resolve this

[TR. 4]

problem.

THE COURT: You would really like to have your trial, wouldn't you, Mr. Flores?

THE DEFENDANT: Well, I would, but —

THE COURT: All right. Then we're going to bring up the panel.

THE DEFENDANT: But I haven't finished. I haven't finished explaining. I would, but seeing that I am alone, I am with the help of no one, it's better that I plead guilty.

THE COURT: Then I want you to answer the following questions. And I do not want to take two hours to do this. I'd just as soon you have your trial. Do you understand?

THE DEFENDANT: Okay.

THE COURT: You understand that if you plead guilty, you give up your right to a speedy and public trial?

THE DEFENDANT: How is that?

THE COURT: If you plead guilty, you give up your right to a speedy and public trial.

THE DEFENDANT: Okay.

THE COURT: There will be no trial if you plead guilty.

THE DEFENDANT: Okay.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You also have the right to have a trial by the Court, one judge. Do you understand that?

[TR. 5]

THE DEFENDANT: Okay.

THE COURT: And if you plead guilty, you give up that right. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Okay. You also have the right to be confronted by witnesses. That means that the prosecutor here will call witnesses that would take the stand and give their testimony. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And your attorney would have the opportunity to cross-examine those witnesses. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Now, if you plead guilty, there would be no trial. And you would be giving up that

right of confrontation and the right to your Counsel to cross-examine.

THE DEFENDANT: How is that?

THE COURT: If plead guilty, there will be no trial. So there would be no witnesses to testify. There would be no witnesses for your attorney to cross-examine.

THE DEFENDANT: Yes. I already told her that although I did not do it, I have to plead guilty.

THE COURT: Do you understand there will be no trial?

THE DEFENDANT: Yeah.

THE COURT: And there will be no witnesses.

[TR. 6]

THE DEFENDANT: Yes.

THE COURT: You understand that you have the right to call witnesses in your behalf?

THE DEFENDANT: Yeah, I understand.

THE COURT: And if you plead guilty, then you would give up that right to call witnesses in your own behalf. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And do you give up that right?

THE DEFENDANT: Yeah.

THE COURT: All right. You have the right against self-incrimination. And that means the right to remain silent. Do you understand you have that right?

THE DEFENDANT: Okay.

IS THE COURT: And you understand if you enter a plea of guilty, you give up that right?

THE DEFENDANT: Yeah.

THE COURT: And do you understand that in a jury trial, all 12 jurors would have to find beyond a reasonable doubt that you are guilty? Do you understand that?

THE DEFENDANT: I think so, because although there may be proofs, there may be proof, it's useless.

THE COURT: Do you understand that all 12 jurors would have to agree to your guilt beyond a reasonable doubt?

THE DEFENDANT: Well, since I did not know what a jury is, since I haven't been for many years in jail, I can't

[TR. 7]

decide whether they're giving me my liberty or more time, more years.

THE COURT: Do you want your jury trial?

THE DEFENDANT: No.

THE COURT: All right. Then do you understand that 12 people make up a jury?

THE DEFENDANT: Yes. I am understanding.

THE COURT: So you know what a jury trial is?

THE DEFENDANT: Now, I do, yes.

THE COURT: And you give up the right to those 12 people considering your guilt beyond a reasonable doubt?

THE DEFENDANT: Yeah. What can I say?

THE COURT: You can say either yes or no.

THE DEFENDANT: I don't know what the answer is.

THE COURT: I have the strange feeling, Mr. Flores, you're playing games with me. And I have run out of time. We're going to bring up the panel. And we're going to start the trial.

THE DEFENDANT: It's not that. My attorney should tell me what I should do or say, whether yes or no. She should tell me yes or no. These are words that I don't understand. Pleas forgive me. Well, if I'm to say yes to everything that is said to me, please, please. If she tells me to say okay or yes to no, I don't know.

THE COURT: You understand all 12 jurors have to find you guilty for you to be found guilty?

[TR. 8]

THE DEFENDANT: Why doesn't she tell me what it is I have to say? I really don't know.

THE COURT: Well, I'm asking you. You are the one that is going to prison. You're the one that has to make up your mind.

THE DEFENDANT: Well, I already said that I was going to plead guilty.

THE COURT: You have to answer certain questions. Do you understand that the prosecutor, the D.A., has to convince 12 jurors that you are guilty?

THE DEFENDANT: Who is the D.A.? She seems to be the defender of Felix Villalobos.

THE COURT: He is going to be a witness against you. You understand that 12 jurors have to find you guilty for you to be found guilty?

THE DEFENDANT: Please tell him that I'm pleading guilty.

THE COURT: You can't plead guilty until I am satisfied you really want to plead guilty.

THE DEFENDANT: Well, I'm saying that I am going to plead guilty.

THE COURT: You understand that 12 jurors have to find you guilty?

THE DEFENDANT: Yes.

THE COURT: And they have to do this beyond a reasonable doubt. That means beyond almost all doubt, not

[TR. 9]

quite, but beyond reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, do you give up that right?

THE DEFENDANT: Yes.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: I'm a permanent resident.

THE COURT: Well, if you are not a citizen, you may be, upon — when you serve your time, you may be deported. If you are a permanent resident, I do not know the status.

MS. KOPS: My advice to Mr. Flores this morning is that he would be deported.

THE COURT: All right. After you serve your time, you will be deported. Do you understand?

THE DEFENDANT: What I am saying is that why am I — that why should I be deported if I have never committed a felony and I'm not a criminal either. I've always liked to work to support my family.

THE COURT: After you plead guilty and are sentenced, you will be a felon. Do you understand?

THE DEFENDANT: Okay.

THE COURT: Understanding you will be deported, do still wish to change your plea?

THE DEFENDANT: If I'm deported, I don't know. If I'm deported, what is going to happen with my family here?

THE COURT: I do not know.

[TR. 10]

THE DEFENDANT: Well, he can decide. I have my children here. My son is here. I was married here in the United States.

THE COURT: You will be deported. You still wish to change your plea?

THE DEFENDANT: Yeah.

THE COURT: All right. You understand that once you are released, if you are sentenced to prison, once you are released, you will be on parole for a period of five years —

Or is it life?

MS. KOPS: I think it can be up to life.

THE COURT: You will be on parole up to life. For the rest of your life, you will be on parole, which means you will have to obey all laws or you could be returned to prison.

THE DEFENDANT: Well, I don't know what it is, but it seems that I'm going to understand that.

THE COURT: It means you have to be a good person and obey all laws.

THE DEFENDANT: Yes. I have always obeyed them.

THE COURT: So you understand you will have to do that as a term of your parole from prison?

THE DEFENDANT: Yeah, yeah.

THE COURT: Have you — if you were to violate your parole, in other words, you weren't a good person and didn't

[TR. 11]

obey all laws, you might go back to prison for up to three years — one year for each violation. You understand?

MS. KOPS: Your Honor, I think on that type of parole, could be for longer possibly than a year, if it's a life parole. I think the rules might —

THE INTERPRETER: I am sorry. The interpreter interpreted three years for each violation.

THE COURT: All right. We can go back.

For a period to be determined by the Department of Corrections. So it's important that you be a good

person when you are released from prison. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now, have you had an opportunity to talk to your lawyer about the case today?

THE DEFENDANT: Just for me to plead guilty to the years they're going to give me.

MS. KOPS: Your Honor, for the record, I believe, the interpreter and I talked to Mr. Flores this morning I would say at least for two hours. That would be my estimate.

THE COURT: That's my estimate, also.

MS. KOPS: And we left at 20 minutes to 1:00 for lunch. And I think we started at 9:30, quarter to 10:00. And we did discuss the case and the jury trial and everything that is on the form and what his different options were.

THE COURT: All right.

And are you pleading guilty, Mr. Flores, freely and

[TR. 12]

voluntarily?

THE DEFENDANT: Yes.

THE COURT: Now, you have been promised for your plea that the District Attorney, in return for your plea of guilty to Count l, which is murder in the second degree, as is the agreement, the District Attorney will dismiss the knife allegation enhancement and dismiss Counts 2 and 3. So has anybody made any promises to you beyond what I have just said in order to obtain your plea of guilty?

THE DEFENDANT: Promise?

THE COURT: In other words, the District Attorney has promised if you plead guilty, she is going to dismiss these other counts and the knife enhancement. Were any other promises made to you?

THE DEFENDANT: No.

THE COURT: All right.

MS. GRIGGS: Can you tell him what the term is for second degree murder?

THE COURT: And you understand that the term for second degree murder is 15 years to life?

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you in order to obtain your plea of guilty?

THE DEFENDANT: Well, no. No. No one, but — but I

[TR. 13]

have to do it.

THE COURT: But nobody has threatened you?

THE DEFENDANT: No.

THE COURT: And, Counsel, do you believe you have had sufficient time to talk to your client about this plea, change of plea?

MS. KOPS: Yes.

THE COURT: And you have discussed with him his rights and his defenses and the consequences of the plea?

MS. KOPS: Yes.

THE COURT: And I do have the executed form of the change of plea. And is it — it has been signed and marked by the defendant. And you have gone over this form with your client this morning and into the noon hour?

MS. KOPS: Yes. And I do not believe, however, that the interpreter signed the form. I think we have to have that signed.

THE COURT: Okay. If the interpreter, please, would. There is a place here on the bottom line for you to sign, if you would do that.

(Thereafter, the interpreter signed the form.)

MS. KOPS: And in going over this change of plea form and all of the discussions I had with Mr. Flores, I, at all times, used the interpreter.

THE INTERPRETER: Your Honor, because of the nature of this, the interpreter would like to state, on the record,

[TR. 14]

that she has adhered very strictly to an interpretation of what the attorney said and what he said with — I did not break loose.

THE COURT: No editorials?

THE INTERPRETER: No editorials, Your Honor.

THE COURT: Do you consent to your client's change of plea?

MS. KOPS: Yes.

THE COURT: All right. Permission to withdraw the previously entered plea of not guilty is granted. And the plea is hereby withdrawn.

Mr. Flores, how do you plead to violation of Section 187 of the Penal Code, a felony, that alleges that on or about May 17th, 1993, you did willfully and unlawfully and with malice aforethought murder Gregorio Orduno Lopez, a human being? Guilty or not guilty?

THE DEFENDANT: That I did it?

THE COURT: That you did it is guilty.

THE INTERPRETER: I am sorry?

THE COURT: That you did it is guilty.

THE DEFENDANT: Well, I did not do it, but I'm pleading guilty.

THE COURT: Is your plea guilty?

THE DEFENDANT: Yeah.

THE COURT: So, Counsel, I understand that this plea is made under People vs. West; is that correct?

[TR. 15]

MS. KOPS: That is correct. And I did write on the form, the change of plea form. And I also went over with Mr. Flores, this morning, numerous times, the explanation that was given for his change of plea and that is that if he goes to trial, there was the risk that he could be found guilty of crimes for which he could receive more severe sentences. And this is the reason that Mr. Flores is pleading guilty.

THE COURT: And Counsel for the People — and I understand, also, that you will stipulate as far as the basis that the preliminary hearing would supply a basis for this.

MS. KOPS: Yes. And I also explained that to Mr. Flores.

MS. GRIGGS: The People so stipulate.

THE COURT: And I understand that you have a witness prepared to testify as to Count 2, that he was assaulted with a knife by Mr. Flores; is that correct?

MS. GRIGGS: That is correct.

THE COURT: And you have a witness who saw, at the scene of stabbing, that saw Mr. Flores with a knife on that occasion?

MS. GRIGGS: I do.

THE COURT: And you have a witness who saw motions being made toward the victim by Mr. Flores. I mean — yes. The victim by Mr. Flores.

[TR. 16]

MS. GRIGGS: And that as soon as that motion ceased, the victim fell to the ground and blood became apparent immediately on his clothing.

THE COURT: All right.

MS. GRIGGS: And also, with regard to Count 3, I have a witness who can testify that the defendant assaulted Gregorio Orduno Lopez with a knife on a separate occasion. That's being dismissed, but you were asking for my factual basis.

THE COURT: Right. That's right.
All right. So the defendant's plea of guilty and waiver of constitutional rights are accepted and will be entered on the minutes of the Court. The reporter is ordered to prepare and certify a transcript of these proceedings with the Clerk of the Court.

Is there anything else, prior to setting a date for sentencing, that should be stated on the record at this time, Counsel?

MS. KOPS: I can't think of any, Your Honor.

THE COURT: All right. Then Mr. Flores, I'm going to set the time for the report of the Probation Office and for sentence in this matter to Wednesday, November the 10th, at 8:30 in the morning, in this department. And you are remanded to the custody of the Sheriff.

MS. GRIGGS: For the record, Your Honor, if at all possible, I would ask that the RPO go on that date, because

[TR. 17]

very shortly thereafter, I will be unavailable.

THE COURT: Well, it's my hope that — how very shortly after that, assuming things go as they should?

MS. GRIGGS: My last day of work, I intend to be the 19th. But that's if, you know, if I'm able to really.

THE COURT: Now, do you have a motion?

MS. GRIGGS: Yes, Your Honor. The People move to dismiss Counts 2 and 3 in light of the defendant's plea and to strike the allegation of personal use of a deadly and dangerous weapon, under 12022(b) as it relates to Count 1.

THE COURT: Those motions are taken under advisement. I will rule upon those motions on November 10th, the date of sentencing.

MS. KOPS: Your Honor, also, consequences of the plea also, I believe, could include a fine. And I advised Mr. Flores this morning of that possibility. But I don't know how likely that is.

THE COURT: Well, Mr. Flores, there is a possibility that you could receive some type of fine. That means a monetary amount to be paid over some period of time by you. Do you understand that?

THE DEFENDANT: I am going to pay money and Jail?

THE COURT: Well, I don't know if you're going to do both. That's up to the Court. But that is possible. Some of it may be paid while you're in Jail.

THE DEFENDANT: Well, I'm of a poor family. And I work

[TR. 18]

in the fields. It's not very steady work. I would not be able to pay money. If you want to give me more jail, just give me more jail.

THE COURT: I thought you were selling ice cream.

THE DEFENDANT: No. Just during the hot season, that's all. I have been locked up for five months.

MS. GRIGGS: Can you tell him that you want him to understand that's a possibility?

THE COURT: It is a possibility. Do you understand?

THE DEFENDANT: Yeah.

THE COURT: All right. We are in recess.

(Recess taken at this time.)
(Thereafter, this matter was concluded.)

[END TRANSCRIPT - PAGE 18, LINE 13]

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, VALERIE ELIZABETH FAUST, Certified Shorthand Reporter, do hereby certify that the foregoing pages comprise a full, true and correct statement of the proceedings as reflected therein.

DATED: Fresno, California
October 22nd, 1993

VALERIE ELIZABETH FAUST,
C.S.R., R.P.R.
OFFICIAL SHORTHAND REPORTER
CERTIFICATE NO. 4922

REPORTER'S TRANSCRIPT, RPO AND JUDGMENT
(SENTENCING HEARING)
NOVEMBER 10, 1993

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

Before the Honorable Dwayne Keyes, Judge
Department 1

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THE PEOPLE OF THE STATE
OF CALIFORNIA, No. 490730-9
Plaintiff,

vs. REPORTER'S TRANSCRIPT

LUCIO ORTEGO FLORES,
Defendant. RPO AND JUDGMENT

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Fresno, California November 10, 1993

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APPEARANCES:

FOR THE PLAINTIFF: EDWARD W. HUNT,
District Attorney for the County
of Fresno
BY: MICHELE GRIGGS
Deputy District Attorney

FOR THE DEFENDANT: JOSE VILLAREAL,
Public Defender of the County
of Fresno
BY: NANCY KOPS
Chief Defense Attorney

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Reported by:
VALERIE ELIZABETH FAUST, C.S.R., R.P.R.
CERTIFICATE NO. 4922

[START TRANSCRIPT - PAGE 2, LINE 1]
WEDNESDAY, NOVEMBER 10, 1993 - MORNING SESSION

(The following proceedings were had in
open court the presence of the Court,
Counsel, defendant and the interpreter:)

THE COURT: I will call Action 490730-9, People of the State of California vs. Lucio Ortego Flores.

If Counsel would state your appearance.

MS. KOPS: Nancy Kops present in court with Lucio Flores. He is also being assisted by the official court interpreter.

THE COURT: All right. The District Attorney is not here. We have gotten a call. The District Attorney will be late. But I other matters that I have to start at 9:00 o'clock. So I just can't wait.

(Thereafter, Michele Griggs, Deputy
D.A., entered the courtroom.)

THE COURT: Here we go. The District Attorney is here. So we will now —

This is the time set for the report of the Probation Department and for sentencing. Is there any — do you waive formal arraignment for sentencing?

MS. KOPS: Yes, Your Honor.

THE COURT: And is there any legal cause why sentencing cannot be pronounced this morning?

MS. KOPS: No, Your Honor.

THE COURT: Is there something you would like to say?

[TR. 3]

I will start with the District Attorney.

Is there anything you wish to state to the Court at

this time?

MS. GRIGGS: I would simply like to note that regarding the circumstances of the offense, the probation officer took that from the testimony of one single witness, which was Mr. Villalobos, the original target of Mr. Flores' wrath. I wanted the Court to know that there are two additional witnesses who saw the blows struck by the defendant. And that was not indicated in this report. And I wanted you to know that, in fact, this defendant was seen lunging toward the victim, and then blood was seen coming out of the victim's side.

THE COURT: And as I understand it, from all the evidence, the victim here, the deceased — there was another victim — the deceased was an innocent bystander.

MS. GRIGGS: Yes, he was.

There is no indication, from any facts I am aware of, that he was doing anything other than simply standing and observing the dispute between Mr. Villalobos and the defendant.

I also wanted to note that both Mr. Villalobos and the victim in this case had been targets of attack by Mr. Flores at other points during the day. Mr. Flores was a target of an attack at approximately 10:00 p.m. that night at a gas station. And earlier that day, in the park,

[TR. 4]

Mr. Flores had chased the victim with a knife over a dispute over territory in Roeding Park. So I wanted the Court to know that the facts as the People believe them to be are not this was a single, rash act, that it was the product of a long — long, meaning at least a period of 12 hours — simmering dispute perhaps, between both

the victim earlier in the day and then later, in the evening, by Mr. Flores.

THE COURT: All right. Thank you.

Counsel.

MS. KOPS: Yes, Your Honor.

I would like to ask the Court to consider a grant of probation in Mr. Flores' case. And as the Probation Office points out, there would have to be unusual circumstances. The unusual circumstances present in this case are the fact that Mr. Flores has a very insignificant prior record. He has one conviction for drunk driving. And he is an older individual. He is not a real young man. He also has a number of children. He has been working his entire life and supporting his children. I would characterize his activities, the activities that have been attributed to him on the day that this happened, as out of character for him.

Again, his record, the record or lack of a record speaks for itself.

Mr. Felix Villalobos himself was not a completely

[TR. 5]

innocent individual. The facts that were brought out at the preliminary hearing indicated that on the evening that this incident occurred, Mr. Villalobos had, to some extent, humiliated Mr. Flores in the presence of other co-workers. Mr. Felix Villalobos was, in a sense, the manager of this particular ice cream vendor business and, in the presence of other co-workers, had made some very negative statements about the fact that Mr. Flores came in late and that he was dumb or stupid, or something to that effect when, in fact, the reason Mr. Flores was late is that he was out selling, to the very last ice cream, what he had in his possession. The person who was killed here was, in effect, an associate of Mr. Villalobos. He had gone with Mr. Villalobos and a

couple of other individuals to the bar where this incident occurred. And they had been drinking, according to the testimony of Mr. Villalobos. There isn't any testimony indicating that the victim who died was anything other than standing around, but he was associated with Mr. Villalobos. And, in effect, there were a group of people standing around Mr. Flores when this happened, all associated with Mr. Villalobos, who had a gun at the time that this happened.

I would also emphasize the fact that Mr. Flores does suffer from some health problems. He has had health problems for a number of years. I don't know if he wants to explain any of them to the Court. But he did again mention

[TR. 6]

them to me yesterday, that he is in some degree of pain. But, primarily, I would argue for the reasons that he has no significant prior record and has been supporting children, this is completely out of character for him to engage in this type of violence. I would ask the Court to give those factors consideration in deciding what the sentence should be.

THE COURT: All right. Thank you, Counsel.

MS. GRIGGS: I would like to briefly respond.

With regard to Mr. Flores' record, there is an error in the probation report at page 4. It shows that Mr. Flores was arrested on a single occasion for battery and 1489 and was then convicted of driving under the influence. That is incorrect, according to CII. CII indicated that this defendant was arrested for battery on 2-21-90, as stated, and a 1489 and was convicted of battery on 3-15-90 and received a 30-day county jail sentence concurrent with a second sentence, which he received for driving under the influence. So there were actually two arrests. One was for battery, a crime of

violence. And he was convicted of both with a concurrent sentence. So there is some history at least of the defendant committing crimes of violence.

Now, the other thing is we do not really know whether this defendant has a history of violence or not, because he was born and raised in Mexico. And the first entry that is on the rap sheet is in 1976. So I do not think we can

[TR. 7]

conclude from that anything, one way or the other, other than the fact that when he was in this country, he was arrested on two separate occasions; once for an alcohol-related offense and one for battery.

I think looking at this entire day, however, illustrates that this defendant was not a peaceful individual. He was a person that resorted to the use of violence and weapons at the slightest provocation.

Earlier in the day, he had a completely unrelated dispute, apparently unrelated to any of the facts in this case, with the actual victim when they were both selling ice cream in Roeding Park. He became enraged. A yelling match ensued. He pulled out a knife, a knife as described by the victim — as described by a witness at the preliminary hearing that appears to be the murder weapon. He pulled that out and chased the victim through Roeding Park until the victim outran him or he got tired, or whatever. But he pulled a knife and threatened him with a knife. Later that evening, he had the verbal dispute which Counsel has characterized as a, I guess, berating him, which I wouldn't disagree with. And after that dispute, the defendant went across the street to a gas station and there assaulted Mr. Villalobos with a knife, including lunging at him with a knife. Mr. Villalobos picked up a garbage can to defend himself and then called the police. And there are facts — there

is a police

[TR. 8]

report in that incident. And those were the two, 245s that were dismissed pursuant to this plea. So the only facts that we can look to to decide what kind of person this defendant is, I think, are the facts that took place on that day. And on three very diverse occasions, each and every time he was angered, he pulled out a knife and he threatened people with it. So I don't think that we can conclude from that that he is a peaceful person or that this is necessarily aberrant behavior. I think he has illustrated by his behavior that he is, in fact, a very dangerous man. And I do not think probation is appropriate. And he took the life of a completely innocent, noncombatant for absolutely no reason. And I do not think that deserves probation.

THE COURT: Counsel, anything further you wish to say?

MS. KOPS: I don't have anything else, Your Honor

THE COURT: Mr. Flores, is there anything you wish to say to the Court prior to the imposition of sentence?

THE DEFENDANT: Yes, that Mr. Felix, when he was giving his testimony, said that I had had difficulties with that person; he had a person living in his house. And I had never seen that man either in the park. That day, Villalobos could not take him outside of town on the bus. So he was selling his ice cream there. And the other guy, too, the two of them stayed there. But I swear, and I give my word, that I did not have any knife. It's not true.

[TR. 9]

That's not true what they came and said in their false testimony.

Many people know me at the park. My wife used to sell cheese. And the only thing she would have was just a little knife for the cheese, to give a little taste of cheese. I had no knife at all, absolutely not in the car, hidden, nor in the belt. Because I was attacked one time by some black men with a gun. The police put me in the patrol car. They searched me well. I had nothing. I had nothing then either. I swear that that isn't true. That's what I have to tell Your Honor.

THE COURT: All right. Mr. Flores, I have considered the — first of all, I have a motion under submission. And that was the motion by the People to dismiss Counts 2 and 3 and to strike the personal use allegation of the deadly weapon as it related to Count 1. Those motions are granted.

In addition to the probation report, which I have considered, I did receive, this morning, a letter from the Victim Services, Victim/Witness Assistance Center. And they interviewed a Mr. Felix Montes, who was a friend of the deceased victim, Gregorio Lopez, age 32. Mr. Montes, who is also a victim in this case, stated he, Gregorio, the victim, was a nice person. We were very good friends." With regard to the defendant, Mr. Montes stated, "That kind of people should not be out on the street. He should get at least 25 years, because my friend didn't have any way to

[TR. 10]

defend himself." Mr. Montes added that he would be present at the sentencing. And Mr. Montes is not present, the record will reflect.

So that is the only other document I have received in addition to the probation report.

Counsel, I assume, did you get a copy of that?

MS. KOPS: Yes. And I did review the probation report with Mr. Flores yesterday.

THE COURT: All right. Mr. Flores, if the Court were to find that this is an unusual case and that justice would be best served if you were granted probation, then that would occur. But considering the factors in 413(c)(1) and (c)(2) the crime was one of violence. And you, obviously — the report and the basis for the plea show that you we armed, that the victim was not. The victim was a bystander in the wrong place at the wrong time.

The Court finds this is an extremely serious crime and a crime that presents you as a danger. And your application for probation is denied. You are sentenced to prison and to be committed to the Department — California Department of Corrections for the term of 15 years to life.

You will receive credits of 267 days; 178 actual, 98 good time/work time credits.

With regard to Government Code Section 13967, you will — I will impose a restitution fine of $1,000.

You may file an appeal 60 days from today's date with

[TR. 11]

this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.

Is there anything else that should be stated on the record at this time, Counsel?

MS. KOPS: I have nothing.

MS. GRIGGS: Nothing further, Your Honor.

THE COURT: You are remanded to the custody of the Sheriff to be delivered to the Department of Corrections, Mr. Flores.

We are in recess.

(Thereafter, this matter was concluded.)
[END TRANSCRIPT - PAGE 11, LINE 11]

-o0o-

STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, VALERIE ELIZABETH FAUST, Certified Shorthand Reporter, do hereby certify that the foregoing pages comprise a full, true and correct statement of the proceedings as reflected therein.

DATED: Fresno, California

February 8th, 1994

VALERIE ELIZABETH FAUST,
C.S.R., R.P.R.
OFFICIAL SHORTHAND REPORTER
CERTIFICATE NO. 4922

CALIFORNIA COURT OF APPEAL
OPINION
FILED AUGUST 12, 1994

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

LUCIO FLORES ORTEGA, F021708

On Habeas Corpus. (Super. Ct. No. 490730-9)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Lucio Flores Ortega, Petitioner, in pro per.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, and Derald E. Granberg, Deputy Attorney General, for Plaintiff and Respondent.

-oo0oo-

*Before Stone (W.A.), Acting P.J., Dibiaso, J., and Harris, J.

STATEMENT OF FACTS

In this petition for writ of habeas corpus, petitioner raises issues regarding his failure to timely file a notice of appeal and request for certificate of probable cause from his 1993 felony conviction in Fresno County Superior Court. The conviction followed petitioner's entry of a plea of guilty.

DISCUSSION

Petitioner claims he does not understand English. Neither his appointed attorney nor his interpreter informed him at sentencing that the above mentioned documents must be timely filed. He claims his plea was involuntary because his attorney told him he would receive a 31/2 year term for second degree murder. Instead, he was sentenced to 15 years to life. He claims to have been pressured into a plea because the change of plea and sentencing occurred on the same day.

We requested a response from the Attorney General which was filed on July 13, 1994. Petitioner did not file a reply.

Judgment is rendered at the time it is orally pronounced. (*People v. Thomas* (1959) 52 Cal.2d 521, 529, fn. 3.) A notice of appeal must be filed within 60 days of the date of the rendition of the judgment. (Cal. Rules of Court, rule 31(a).) A criminal defendant has the burden of timely filing a notice of appeal, but the burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) However, this court is vested with discretion to grant a petitioner relief from default in timely filing a notice of appeal and/or request for certificate of probable cause as required under California Rules of Court, rules 31(a) and (d) and Penal Code section 1237.5.

There has developed a judicial policy that reasonable doubts as to the veracity of a petitioner's allegations in these matters are to be resolved in favor of the petitioner in order to protect the right of appeal, as well as the policy that this court's power to grant relief from default in these instances be liberally exercised so that in proper cases appeal rights will not be forfeited on technical grounds. (*Cf. People v. Rodriguez* (1971) 4 Cal.3d 73, 79; *see also In re Benoit* (1973) 10 Cal.3d 72, 89.)

In the present case, trial counsel did not file a notice of appeal or request for certificate of probable cause on petitioner's behalf. However, the reporter's transcripts provided by the Attorney General make clear pertinent facts.

First, contrary to petitioner's assertion, plea occurred almost one month prior to sentencing. Second, petitioner offered to change his plea during trial. An interpreter was present at the proceeding. The court admonished petitioner that deportation would result from entry of a plea of guilty of second degree murder, and that the term for second degree murder is fifteen years to life. Prior to the sentencing hearing, a probation report was completed. The probation officer recommended a term of 15 years to life. At sentencing, an interpreter was again present. Petitioner expressed no surprise or objection to the term imposed.

DISPOSITION

The petition for writ of habeas corpus is denied.

CALIFORNIA SUPREME COURT
ORDER DENYING WRIT OF HABEAS CORPUS
FILED JANUARY 18, 1995

ORDER DENYING WRIT OF HABEAS CORPUS

No. S042190

IN THE SUPREME COURT OF CALIFORNIA

IN RE LUCIO FLORES ORTEGA

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Chief Justice

PETITION FOR WRIT OF HABEAS CORPUS FILED JULY 27, 1995

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT — District: Eastern District of California

Name: LUCIO FLORES ORTEGA — Prisoner No.: J-01040

Place of Confinement
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Name of Petitioner (includes name under which convicted)
LUCIO FLORES ORTEGA

V.

Name of Respondent (authorized person having custody of petitioner)
ERNEST C. ROE, Warden CSP-LAC

The Attorney General of the State of:
CALIFORNIA, DANIEL E. LUNGREN

PETITION

1. Name and location of court which entered the judgment of conviction under attack:
   Fresno County Superior Court,
   1100 Van Ness Avenue,
   Fresno, CA 93721 (Department #13)

2. Date of judgment of conviction:
   November 11, 1993

3. Length of sentence:
   15 years to life

4. Nature of offense involved (all counts):
   Second degree murder [California Penal Code section 187]

5. What way your plea? (Check one):
   (a) Not guilty
   (b) Guilty X
   (c) Nolo contedere

   If you entered a guilty plea to one count or indictment, and a guilty plea to another count or indictment, give details:

   _____

6. If you pleaded guilty, what kind of trial did you have?
   (Check one)
   (a) Jury
   (b) Judge only

7. Did you testify at trial?
   Yes No

8. Did you appeal from the judgment of conviction?
   Yes No X

9. If you did appeal, answer the following:

(a) Name of court:
(b) Result:
(c) Date of result and citation, if known:
(d) Grounds raised:
(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court:
(2) Result:
(3) Date of result and citation, if known:
(4) Grounds raised:

(f) If you file a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court:
(2) Result:
(3) Date of result and citation, if known:
(4) Grounds raised:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes **X** No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court:
California Court of Appeal, Fifth Appellate District
(2) Nature of proceeding:
Petition for writ of habeas corpus
(3) Grounds raised:
Ineffective assistance of counsel [failure to file

a timely notice of appeal]
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No **X**

(5) Result:
Petition for writ of habeas corpus denied
(6) Date of result:
August 12, 1994

(b) As to any second petition, application or motion give the same information:

(1) Name of court:
California Supreme Court
(2) Nature of proceeding:
Petition for writ of habeas
(3) Grounds raised:
Abuse of discretion/Appellate Court failure to grant relief from default in timely filing of appeal; (2) Ineffective assistance of counsel [failure to file timely notice of appeal]; (3) Ineffective assistance of counsel [coerced guilty plea]
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No **X**
(5) Result:
Petition for writ of habeas corpus denied
(6) Date of result:
January 18, 1995

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes **X** No
(2) Second petition, etc. Yes **X** No

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State any ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.
CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed if you have exhausted your state court remedies with respect to them. However, you should in raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against

double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which as unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Petitioner was denied effective assistance of trial counsel wherein, counsel failed to file timely notice of appeal.

Supporting FACTS (state *briefly* without citing cases or law):
Petitioner's trial attorney NANCY KOPS, had promised petitioner at the time of sentencing that she would timely file a notice of appeal on petitioner's behalf. Trial counsel did not alternatively instruct/inform petitioner of his right of appeal or how petitioner might otherwise perfect a notice of appeal in pro per.

B. Ground two:

Supporting FACTS (state briefly without citing cases or law):

C. Ground three:

Supporting FACTS (state briefly without citing cases or law):

D. Ground four:

Supporting FACTS (state briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes No X

15. Give the names and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:
Nancy Kops, Chief Defense Attorney,
Fresno County Public Defender,
2220 Tulare St., Suite 300, Fresno, CA 93721

(b) At arraignment and plea:
Nancy Kops, Chief Defense Attorney,
Fresno County Public Defender,
2220 Tulare St., Suite 300, Fresno, CA 93721

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:
Petitioner In Propia Persona

(g) On appeal from any adverse ruling in a post-conviction proceeding:
Petitioner In Propia Persona

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?
Yes No X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes No X

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes No X

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

NEXT FRIEND PETITIONER

I declare under penalty of perjury that the foregoing is true and correct. Executed on

JUL 12 1995
(date)

Signature of Petitioner

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propia Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	No. _____
Petitioner,	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY; WITH
-vs-	MEMORANDUM OF POINTS AND
ERNEST C. ROE, Warden,	AUTHORITIES IN SUPPORT THEREOF
Respondent.	
_____	28 U.S.C. SECTION 2254

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
NEXT FRIEND PETITION

BYRON CHAPIN MYERS, E-26677
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620
Next Friend Petitioner

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propia Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	Nc. _____
Petitioner,	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
-vs-	STATE CUSTODY; WITH
ERNEST C. ROE, Warden,	MEMORANDUM OF POINTS AND
Respondent.	AUTHORITIES IN SUPPORT THEREOF
_____	28 U.S.C. SECTION 2254

NEXT FRIEND PETITION

To the Honorable, The United States District Court for the Eastern District of California:

Petitioner, Lucio Flores Ortega, a person not sui juris, by and through a Next Friend,[1] and by this jointly verified petition, respectfully alleges as follows:

I.

INTRODUCTION

1. Petitioner, Lucio Flores Ortega, is a citizen of Mexico who, is currently confined in state prison in the custody of respondent.

2. Respondent, Ernest C. Roe, is the Warden of California State Prison at Los Angeles County in Lancaster, California. (hereinafter CSP-LAC.) Respondent, as Warden of CSP-LAC, has constructive custody of petitioner.

II.

PETITIONER IS UNLAWFULLY RESTRAINED

3. Petitioner is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the State of California in the custody of respondent.

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1. [Because the Joint Appendix is a single, computer-generated document, the footnotes are numbered sequentially throughout the Joint Appendix. Thus, most footnote numbers in the Joint Appendix do not correspond to footnote numbers in the original source documents. However, at the beginning of each footnote, the Warden has indicated the corresponding footnote number in the original source document.]

[Footnote 1 of Petition.] Next friend, Byron Chapin Myers, pursuant to Federal Rules of Civil Procedure, Rule 17(c) and, Local Civil Rules of the Eastern District of California, Rule 202(a) has submitted a jointly filed motion, moving this Court to be duly appointed as a "next friend" on behalf of the petitioner herein.

4. Petitioner's imprisonment and detention are unlawful in that petitioner was denied the effective assistance of trial counsel wherein, attorney Nancy Kops, failed to file a timely Notice of Appeal on behalf of petitioner following his conviction for second degree murder, and/or use of a knife in violation of California Penal Code sections 187 and 12022, subdivision (b).

5. California State law provides defendants in criminal cases with the right to appeal under California Penal Code section 1237. Trial counsel's failure to timely file a Notice of Appeal on petitioner's behalf pursuant to the statutory time limits set forth in California Rules of Court, Rule 31(a), constituted ineffective assistance of counsel, whereas, California Penal Code section 1240.1, subdivisions (a) and (b), imposes a statutory duty on the part of trial counsel to file a timely Notice of Appeal.

6. Trial counsel's failure to file a timely Notice of Appeal on petitioner's behalf violates petitioner's Sixth Amendment right to the assistance of counsel, as well as, petitioner's Fourteenth Amendment right to due process under the United States Constitution.

III.

FACTS

7. On October 13, 1993, petitioner, Lucio Flores Ortega, was to have begun the jury selection process in Fresno County Superior Court in the matter of People of the State of California v. Lucio Flores Ortega, Case No. 490730-9. (R.T. p. 3.)[2]

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2. [Footnote 2 of Petition.] "R.T." refers to the Official Court Reporter's transcript prepared on February 8, 1994, which, reflected proceedings held on October 13, 1993 [Change of Plea].

8. On October 13, 1993, the same date petitioner was to have begun his jury trial, petitioner met with trial counsel and a court appointed interpreter that morning for approximately two (2) hours discussing petitioner's case. (R.T. p. 11.)

9. During the above-mentioned discussion petitioner was informed by his trial counsel, Nancy Kops, that she was wholly unprepared to proceed to trial in his matter, and vehemently urged petitioner to plead guilty for that reason. (See Exhibit "A", Affidavit of Petitioner, attached hereto and incorporated by reference.)

10. During the entire length of the discussion between petitioner and his trial counsel, petitioner had consistently and continually asserted his desire to have a trial and present witnesses in his defense. (Exhibit "A".)

11. Petitioner, after having discussed the matter at length on the morning of October 13, 1993, had been led to believe his attorney, that he would only serve three and one half years in state prison in exchange for his plea of guilty. (R.T. p. 11.) (Exhibit "A".)

12. The record as a whole[3] leaves grave doubt and uncertainty as to whether or not petitioner actually understood any significant portion of the proceedings to

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[Footnote 2 appears at the bottom of page 3 of Prisoner's Petition. There is no corresponding footnote number in the text of page 3. The Warden has inserted footnote 2 following the first citation to the Reporter's Transcript.]

3. [Footnote 3 of Petition.] Petitioner requests that this Court take judicial notice of the Reporter's Transcripts of the proceedings held on October 13, 1993, and, the proceedings held on November 10, 1993, pursuant to Federal Rules of Evidence, Rule 201(f). The Reporter's Transcript for both proceedings are attached hereto as Appendixes "ONE" and "TWO". Petitioner has never received a Transcript record of the preliminary hearing held in his case. As such, petitioner submits these appendices as constituting the entire record in his case, that is relevant to this action.

the extent that he was cognizant that he was waiving his fundamental rights to confrontation, compulsion of witnesses, presenting a defense, etc.

13. The record is silent, in that it lacks any mention that petitioner's plea was made "voluntarily" as well as, "knowingly".

14. Petitioner requested that his trial counsel, Nancy Kops, file a Notice of Appeal on his behalf. (Exhibit "A".)

15. Trial counsel, Nancy Kops, assured petitioner that she would file a Notice of Appeal on petitioner's behalf at the close of petitioner's sentencing on November 10, 1993. (Exhibit "A".)

IV.

PROCEDURAL HISTORY

16. On November 10, 1993, petitioner was advised by the sentencing court of his right to appeal, and, immediately thereafter, requested that his trial counsel file a Notice of Appeal. (R.T. 11/10/93 at pp. 10-11 [Appendix TWO].) (Exhibit "A".)

17. On or about March 24, 1994, petitioner having realized that his trial attorney had not filed a timely Notice of Appeal, submitted a Notice of Appeal and Request for Certificate of Probable Cause to the Fresno County Superior Court. (See Exhibit "B", Notice of Appeal/Certificate of Probable Cause, attached hereto and incorporated by reference.)

18. On or about April 8, 1994, the Fresno County Superior Court Clerk notified petitioner that his Notice of Appeal had been received but not filed, citing the expiration of the sixty-day statutory period for filing an appeal. The court also informed petitioner, that if he wished to pursue the matter any further, to contact the Fifth District Court of Appeals. (See Exhibit "C", Letter

of April 8, 1994, Fresno Superior Court, attached hereto and incorporated by reference.)

19. On or about June 1, 1994, petitioner filed a petition for writ of habeas corpus with a jointly filed Ex-Parte Motion for Leave to File a Belated Notice of Appeal in the California Court of Appeal, Fifth Appellate District. (See Exhibit "D", Ex-Parte Motion for leave to File a Belated Notice of Appeal, attached hereto and incorporated by reference.)

20. On August 12, 1994, the California Court of Appeal, Fifth Appellate District denied petitioner's petition for writ of habeas corpus. (See Exhibit "E", Opinion issued by the Court of Appeal, attached hereto and incorporated by reference.)

21. On or about September 10, 1994, petitioner filed a petition writ of habeas corpus in the California Supreme Court, alleging, inter alia, that the Fifth Appellate District Court of Appeal abused its discretion in failing to, grant relief from procedural default in light of the fact that petitioner's trial counsel failed to file a timely Notice of Appeal on his behalf. (See Exhibit "F", Petition for Writ of Habeas Corpus, California Supreme Court [at Ground One], attached hereto and incorporated by reference.)

22. On January 18, 1995, the California Supreme Court denied petitioner's writ of habeas corpus without issuing an opinion.[4] (See Exhibit "G", Supreme Court's denial, attached hereto and incorporated by reference.)

23. On or about June 13, 1995, petitioner approached this "next friend" in the prison law library at CSP-LAC to inquire about his defunct hopes of filing an appeal in his case.

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4. [Footnote 4 of Petition.] *See Lewis v. Borg*, 879 F.2d 697, 698 (9th Cir. 1989) [wherein, exhaustion requirement satisfied when state supreme court denied state habeas petition without comment].

24. After having gone over the tortured procedural history of petitioner's bid for appellate review, this "next friend", agreed to assist petitioner in his attempt to seek appellate review of the Superior Court judgment. (See Affidavit of "Next Friend" which accompanies the jointly filed Motion to be duly appointed "next Friend" [guardian ad litem].)

25. On June 19, 1995, petitioner, through a next friend, sent a letter of inquiry to trial counsel, Nancy Kops, formally inquiring as to why counsel failed to timely file a Notice of Appeal on petitioner's behalf. It was petitioner's desire to elicit a response as to the circumstances in counsel's failure to file the Notice of Appeal after having assured petitioner that she would do so. (See Exhibit "H", Letter of Inquiry to Trial Counsel, Nancy Kops, attached hereto and incorporated by reference.)

26. On June 29, 1995, next friend for petitioner received a letter of response from petitioner's trial counsel, Nancy Kops. In her response, trial counsel stated that she had no independent recollection of petitioner discussing a desire to file an appeal, relying on the fact that she had no notes in her file that such a conversation ever occurred. (See Exhibit "I", Response of Trial Counsel, Nancy Kops, attached hereto and incorporated by reference.)

27. Petitioner, having exhausted his state remedies as to counsel's failure to timely file his Notice of Appeal, by pursuing this matter to the state's highest court pursuant to U.S.C. section 2254(c), hereby petitions this Honorable Court on the grounds that his confinement violates the Sixth and Fourteenth Amendments to the United States Constitution.

V.

REQUEST FOR JUDICIAL NOTICE

28. Petitioner requests that this Court take judicial notice of the Petition for Writ of Habeas Corpus filed on behalf of another prisoner in the California Court of Appeal, Second Appellate District by next friend, Byron Chapin Myers, pursuant to Federal Rules of Evidence, Rule 201(b), (d) and (f). For cause, petitioner would show that the ruling of law as found in the above-mentioned petition in the Court of Appeal Case entitled *In re Torrence*, Case No. B084778, should have been applied by the Court of Appeal in petitioner's case as well. (See Appendix "THREE", Petition for Writ of Habeas Corpus, Court of Appeal, Second Appellate District, attached hereto and incorporated by reference.)

VI.

CLAIMS FOR RELIEF

29. The petition should be granted because petitioner was denied his right to effective assistance of counsel as guaranteed by Article I, Section 15 of the California State Constitution, and the Sixth Amendment to the United States Constitution in that petitioner's trial counsel, Nancy Kops, failed to file a timely Notice of Appeal on behalf of petitioner, her client. Under California law, trial counsel in this regard, has two statutory duties imposed by California Penal Code section 1240.1. Under section 1240.1, subdivision (a), the attorney must [p]rovide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal.

30. Petitioner contends, and hereby affirmatively alleges that, at the close of his sentencing proceeding

shortly after the sentencing court advised petitioner of his right to appeal, that he requested trial counsel to file a notice of appeal on his behalf, and additionally inquired of counsel: "Can this thing be fixed?" (referring to the guilty plea.) Trial counsel did assure petitioner at this point, that she would file a Notice of Appeal on his behalf.

31. The second duty imposed by statute is found under 1240.1, subdivision (b) which, requires that, trial counsel must file a timely Notice of Appeal when counsel feels that meritorious grounds exist and an appeal is in the defendant's best interests [or] when the defendant requests trial counsel to do so.

32. In this case, trial counsel led petitioner to believe that she intended to file a notice of Appeal within the sixty-day statutory period, and failing to do so, counsel violated her duty under section 1240.1, subdivision (b).

33. The petition should be granted because petitioner was denied due process of law as set forth in *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993), in that trial counsel did not file a timely Notice of Appeal even after having been requested to do so by petitioner, and promising to do so of her own accord and volition.

VII.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that:

(1) That this Court issue a writ of habeas corpus or order to show cause why the writ should not be issued to respondent, to inquire as to the legality of petitioner's restraint, returnable before this Court, directing respondent to specifically admit, deny or otherwise respond to the allegations made herein;

(2) That this Court appoint counsel for petitioner pursuant to 18 U.S.C. section 3006A(g), wherein this Court has the inherent discretion to appoint counsel concerning matters brought pursuant to 28 U.S.C. sections 2241 and 2254;

(3) That this Court appoint a referee or master to conduct a hearing at which proof may be offered of any contested factual issues raised by the denial and traverse and to make recommendations to this Court concerning the proper determination of any factual issues presented;

(4) That this Court vacate the California Court of Appeals denial and remand the matter to the Court of Appeal for further proceedings, and;

(5) That this Court grant petitioner any further relief that this Honorable Court deems just and equitable in the interest of justice.

Respectfully submitted,

DATED: JUL 12 1995

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner In Propria Persona

DATED: JUL 12 1995

BYRON CHAPIN MYERS, E-26677
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Next Friend Petitioner

VERIFICATION

I, Byron Chapin Myers, declare:

I am a next friend to petitioner herein. I have read the foregoing petition and know the contents thereof are true of personal knowledge, except as to matters cited to in the attached exhibits and the companion record they provide, all of which, inasmuch as they are represented to he true, I believe them to be true.

Pursuant to Rule 17(c) of the Federal Rules of Civil Procedure, I am making this verification jointly, and on petitioner's behalf because petitioner lacks the requisite academic skills, and does not possess the present ability to communicate fluently in the English language to the extent of filing meaningful pleadings to the Court.

Pursuant to 28 U.S.C. section 1746, I, Byron Chapin Myers, declare under penalty of perjury and the laws of the United States, that the foregoing is true and correct.

DATED: JUL 12 1995

BYRON CHAPIN MYERS
Next Friend Petitioner

DATED: JUL 12 1995

LUCIO FLORES ORTEGA
Petitioner In Propria Persona

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, Lucio Flores Ortega, seeks relief from the denial of his habeas corpus petition in state court alleging the ineffective assistance of trial counsel for failing to timely file a notice of appeal.

B. State Court Proceedings.

On October 13, 1991, petitioner entered a plea of guilty to second degree murder within the meaning of Penal Code section 187, on the advice of his trial counsel.

On November 10, 1993, petitioner was sentenced to state prison for a term of 15 years to life. At sentencing, petitioner was advised of his right to appeal the judgment. Petitioner's trial counsel promised to file the notice of appeal, on petitioner's behalf within the statutory time limits.

On or about June 1, 1994, petitioner filed a joint petition for writ of habeas corpus along with a belated notice of appeal and application for certificate of probable cause in the California Court of Appeal, Fifth Appellate District, alleging, inter alia, ineffective assistance of trial counsel for failing to file a timely notice of appeal.

On August 12, 1994, the Court of Appeal denied petitioner's petition for writ of habeas corpus. (Exhibit "E".)

On or about September 10, 1994, petitioner filed a petition for writ of habeas corpus in the California

Supreme Court, alleging, inter alia, that the Fifth Appellate District Court of Appeal abused its discretion in failing to grant relief from the procedural default occasioned by petitioner's trial counsel in failing to timely file a notice of appeal on his behalf. (Exhibit "F".)

On January 18, 1995, the California Supreme Court denied petitioner's writ of habeas corpus without an opinion or citation to case law. (Exhibit "G".)

ARGUMENT

II

INTRODUCTION

The right to petition for a Writ of Habeas Corpus antedates the Federal Constitution. (*Bushell's Case* (1677) 124 Eng.Rep. 1006.) Habeas Corpus is explicitly recognized in the Federal Constitution. (Article I, Section 11; Article VI, Section 10.)

Habeas corpus has often been referred to as the "great writ." It is deeply rooted in the common law and has played an important role in the historical struggle for liberty. (*Fay v. Noia* (1963) 372 U.S. 391, 399, *Wright v. West*, (1992) 112 S.Ct. 2482, 2486-90.)

III

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS TRIAL ATTORNEY HAD FAILED TO TIMELY FILE A NOTICE OF APPEAL ON PETITIONER'S BEHALF

A. Introduction.

The U.S. Supreme Court in *Powell v. Alabama* stated:

> "This Court has repeatedly recognized, in an often quoted phrase, that a criminal defendant 'requires the guiding hand of counsel at every step in the proceedings against him'." (*Powell v. Alabama*, (1932) 287 U.S. 45, 69.)

Claims of ineffective assistance of counsel are appropriately addressed in habeas corpus proceedings. *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991); *United States v. Daly*, 974 F.2d 1215 (9th Cir. 1992). Petitioner, Lucio Flores Ortega, was deprived of his Sixth Amendment right to the effective assistance of counsel.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. (*Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 634-37.)

Construed in the light of its purpose, the right entitles the defendant to more than just bare assistance

rather, the defendant is entitled to effective assistance, "reasonably competent assistance of an attorney acting as diligent conscientious advocate." *People v. Ledesma*, ( ) 43 Cal.3d 171, 215; *see also Strickland v. Washington*, *supra*, 466 U.S. 668, 686-89.)

A defendant, thus, has a right to expect that his counsel will undertake [o]nly those actions that a reasonably competent attorney would undertake and that before counsel undertakes to act at all, he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 691.)

The analysis under *Strickland* has two components. First, petitioner must show that his lawyer rendered deficient performance by specifying acts and omissions which allegedly fell outside the wide range of professionally competent assistance. *Id.* at 687, 104 S.Ct. at 2064-66. Second, petitioner must demonstrate that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064. That is, the petitioner must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine our confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068.

B. Trial Counsel's Performance Fell Below An Objective Standard of Reasonableness Under Prevailing Professional Norms

Petitioner concedes that counsel should be afforded a wide range of latitude when exercising his discretion among possible tactical alternatives relied upon in defending his client. However, when counsel's performance is assessed in light of failing to perform a

duty which, is statutorily required of all attorneys under similar circumstances, his performance can be weighed against prevailing professional norms without having to rely upon the deferential scrutiny of counsel's performance normally associated with a choice among possible tactical alternatives. Petitioner has alleged that trial counsel, Nancy Kops, has failed in her statutorily required duties to file a timely notice of appeal on petitioner's behalf within the express meaning of Penal Code section 1240.1, subdivision (b), thus, implicating the Sixth Amendment to the United States Constitution. Petitioner has alleged that California Penal Code section 1240.1, subdivision (b) requires that trial counsel must file a timely notice of appeal when counsel feels meritorious grounds exist and an appeal is in the defendant's best interest [or] when the defendant requests trial counsel to do so. (Petition at paragraph 31.) Petitioner's indigency at the time the notice of appeal should have been filed, qualified him for the appointment of counsel on appeal by law in California. Naturally, this would have relieved trial counsel of any further responsibility beyond the initial filing of the notice of appeal. This could have been facilitated by simply preparing a one-page Notice of Appeal on petitioner's behalf designating petitioner as pro per, allowing petitioner to just direct its service to the court clerk. (See the Notice of Appeal prepared by trial counsel on behalf of next friend, BYRON CHAPIN MYERS, attached hereto as Exhibit "J", and incorporated by reference.)

In assessing trial counsel's performance to that end, it is interesting to note that all of the litigation subsequent to petitioner's sentencing was all for want of a simple one-page notice, possibly one of the simplest pleadings known to the legal profession.

C. Petitioner Was PreJudiced By Counsel's Failings Under The "Strickland" Standard

The second component of the *Strickland* standard, commonly referred to as the "prejudice prong," is satisfied when, "absent counsel's errors, there is a reasonable probability of a more favorable outcome." (*Ledesma*, *supra*, at p. 218.) For the purposes of petitioner's allegations, a more favorable outcome would have been appellate review of Superior Court judgment resulting from his questionable guilty plea and its attendant circumstances, a right guaranteed him by California law, hence, protected by the Fourteenth Amendment to the United States Constitution.

Under the prejudice prong of *Strickland*, a "reasonable probability" is not a showing that "counsel's conduct more likely than not altered the outcome in the case," but simply "a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

The conduct of petitioner's trial counsel, Nancy Kops, fell far below the minimum level of competence which is required to provide effective assistance and clearly this deficient performance prejudiced petitioner, because had trial counsel filed petitioner's notice of appeal in a timely manner, petitioner would have qualified for appointed counsel on appeal who, would have been in a far better position to challenge the lower court's judgment than petitioner. It cannot be said that trial counsel's omission (inaction) and the resulting harm caused petitioner from lack of appellate review was anything but substandard and deficient, and entirely inconsistent with, as well as irreconcilable with the substantial ends of justice.

CONCLUSION

Petitioner has exhausted all remedies available under California law in an effort to secure prompt determination of his constitutional claim.

WHEREFORE, for the reasons stated herein, petitioner prays that this Honorable Court issue a writ of habeas corpus granting the relief prayed for herein and for such other and further relief this Court deems just and proper.

Respectfully submitted,

DATED: JUL 12 1995

_____
LUCIO FLORES ORTEGA
Petitioner in Propia Persona

DATED: JUL 12 1995

_____
BYRON CHAPIN MYERS
Next Friend Petitioner

AFFIDAVIT OF PRISONER FILED JULY 27, 1995

LUCIO FLORES ORTEGA
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Petitioner in Propria Persona

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner, -vs- ERNEST C. ROE, Warden, Respondent.	No. _____ AFFIDAVIT OF PETITIONER, LUCIO FLORES ORTEGA, IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

STATE OF CALIFORNIA,	)	AFFIDAVIT
	) ss.	OF LUCIO FLORES
COUNTY OF LOS ANGELES.	)	ORTEGA

I Lucio Flores Ortega, having first been duly sworn, deposes and affiates as follows:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am the petitioner in the above-entitled case now before this Honorable Court.

2. I was represented in the criminal action entitled, People v. Lucio Flores Ortega, Fresno County

Superior Court Case Number 490730-9, by counsel or record, Nancy Kops, whose address is:

NANCY KOPS
Chief Defense Attorney
Fresno County Public Defender
2220 Tulare Street, Suite 300
Fresno, CA 93721

3. On October 13, 1993, while meeting with my appointed attorney through an interpreter, I continually emphasized my desire to plead not guilty to the charges pending against me due to my factual innocence.

4. My attorney, Nancy Kops, told me that having a trial was not a good idea because she was not ready to take my case to trial, and as a result, I could lose my case.

5. My attorney, Nancy Kops, told me during this same conversation that she had met with the prosecuting attorney and that if I admitted that I was guilty to the Court, I would only have to serve three and one half years in prison. But if I had a trial, I would lose for sure.

6. During the entire conversation with my attorney that morning, I kept telling her that I did not do the crime that I was being charged with, and that I did not understand why she wanted me to say I did. She (my attorney) told that there was no other choice, except to go to trial and lose my case.

7. I never wanted to say that I was guilty because I was not. I only told the Court that I was guilty because my attorney told me many times that I had no other choice, except to go to prison for a long time.

8. On November 10, 1993, when I was finished telling the court that I was guilty, against my will, I asked my attorney, Nancy Kops, "Can this be fixed", because I did not want to say I was guilty.

9. My attorney, Nancy Kops, told me that I had the right to appeal the judgment like the court said. I did not understand what an appeal was, so she explained that I could have a higher Court look at my case. She (my attorney) then told me that she would file the papers for that (a notice of appeal), and I thanked her for that.

10. After I discovered that my attorney, Nancy Kops, did not file my notice of appeal on time, I tried my best to file my own, but the Courts kept telling me that I was too late.

This document has been translated from my native language, and read back to me in the same. I believe it to be an accurate representation of my statements given herein.

Pursuant to 28 U.S.C. section 1746, I, Lucio Flores Ortega, declare under penalty of perjury and the laws of the United States that the foregoing is true and correct. Executed this date JUL 12 1995 at California State Prison at Los Angeles County in Lancaster, California.

LUCIO FLORES ORTEGA, J-01040
California State Prison
Los Angeles County
44750 60th Street West
Lancaster, CA 93536-7620

Affiant

DECLARATION OF NANCY KOPS
DATED NOVEMBER 16, 1995

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
ROBERT R. ANDERSON, Senior
Assistant Attorney General
J. ROBERT JIBSON, Supervising
Deputy Attorney General
PAUL E. O'CONNOR (State Bar # 170829)
Deputy Attorney General
1300 I Street, Suite 1100
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5290

Attorneys for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV-F-95-5612-GEB-HGB

Petitioner,

vs

ERNEST C. ROE, DECLARATION OF NANCY KOPS

Respondent.

I, Nancy Kops, declare and if called to testify would so state:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am deputy public defender employed by the Public Defender of Fresno County.

2. The Fresno County Public Defender represented the petitioner, Lucio Flores Ortega, in Fresno County Superior Court case number 490730-9, from May 1993 to November 10, 1993, when petitioner was sentenced. I was petitioner's chief defense attorney.

3. Petitioner pled guilty to second-degree murder on October 13, 1993. He pled guilty in a trial department, just prior to jury selection. A very experienced interpreter went over a change-of-plea form at length with petitioner. The judge who took the plea spent time reviewing the plea form with petitioner prior to accepting his plea. The district attorney dismissed two counts of felony assault with a deadly weapon in exchange for the plea.

4. I kept file notes on conversations that I had with petitioner from August 16, 1993, to November 10, 1993. There are no notes regarding petitioner making a request to file an appeal. It is my policy to make notes of such requests. I have no independent recollection of petitioner discussing a desire to file an appeal after he pled guilty. I recall that the interpreter and I spent quite a bit of time, prior to the plea, talking with petitioner about his options.

5. I did not promise to file a notice of appeal on petitioner's behalf.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 16, 1995

Nancy Kops
Deputy Public Defender

**ANSWER TO PETITION
FOR WRIT OF HABEAS CORPUS
FILED NOVEMBER 17, 1995**

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE H. WILLIAMSON, Chief Assistant
Attorney General
ROBERT R. ANDERSON, Senior
Assistant Attorney General
J. ROBERT JIBSON, Supervising
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Attorneys for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV. F-95-5612-GEB/HGB

Petitioner, ANSWER

-vs-

ERNEST C. ROE, Warden,

Respondent.

COMES NOW respondent Ernest C. Roe, Warden of the California State Prison-Los Angeles County, and moves that the application for writ of habeas corpus filed on July 27, 1995, be denied on the following grounds:

I

Petitioner Lucio Flores Ortega is duly and lawfully confined at the California State Prison, Los Angeles County, by virtue of a valid judgment of the Superior Court of the State of California, in and for the County of Fresno, Number 490730-9, entered November 10, 1993, upon his guilty plea and subsequent conviction for one count of murder. (Cal. Pen. Code, § 187(a).)[5]

II

On August 12, 1994, the California Court of Appeal, Fifth Appellate District, denied petitioner's petition for writ of habeas corpus.

III

On January 18, 1995, the Supreme Court of California denied petitioner's petition for writ of habeas corpus in S042190; consequently, petitioner has exhausted his state court remedies.

IV

On July 27, 1995, petitioner filed a federal petition for writ of habeas corpus, and on September 26, 1995, the district court filed its order directing respondent to file an answer to the petition. In this action, petitioner raises only one ground for habeas corpus review: ineffective assistance of counsel due to trial counsel's failure to timely file a notice of appeal.

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5. [Footnote 1 of Answer.] All further statutory references are to Deering's Annotated Code, 1974, and its 1995 pocket supplement, unless otherwise indicated.

V

Petitioner's application for writ of habeas corpus must be denied because petitioner has not met his burden of showing that trial counsel's assistance was ineffective. There is no evidence that he requested trial counsel to file a notice of appeal or that trial counsel believed there was an arguably meritorious ground for appeal.

VI

Upon information and belief, respondent denies the allegation in paragraph 3 of the petition that petitioner is unjustly and unlawfully imprisoned and restrained.

VII

Upon information and belief, respondent denies the allegations in paragraphs 4, 5, 6, and 29 of the petition that petitioner was denied effective assistance of counsel because his trial counsel failed to timely file a notice of appeal.

VIII

Upon information and belief, respondent denies the allegations in paragraph 9 of the petition and paragraph 4 of petitioner's affidavit that on October 13, 1993, the date that jury selection was to begin, petitioner's trial counsel informed petitioner that she (trial counsel) was unprepared for trial and advised petitioner that for that reason he should plead guilty.

IX

Upon information and belief, respondent denies the allegation in paragraph 10 of the petition and paragraph 3 of petitioner's affidavit that during the entire length of his October 13, 1993, discussion with trial counsel petitioner consistently asserted his desire to have a trial and present witnesses in his defense.

X

Upon information and belief, respondent denies the allegation in paragraph 11 of the petition and paragraph 5 of petitioner's affidavit that he was led to believe that he would only serve three and one-half years in state prison in exchange for his guilty plea.

XI

Upon information and belief, respondent denies the allegation in paragraph 5 of petitioner's affidavit that petitioner's trial counsel informed him that if he went to trial he would lose "for sure."

XII

Upon information and belief, respondent denies the allegation in paragraph of petitioner's affidavit that petitioner kept telling his trial counsel that he was innocent and did not understand why trial counsel wanted petitioner to say that he was guilty.

XIII

Upon information and belief, respondent denies the allegation in paragraph 6 of petitioner's affidavit that his

trial counsel replied that there was no alternative to pleading guilty except going to trial and losing.

XIV

Upon information and belief, respondent denies the allegation in paragraph 7 of petitioner's affidavit that he never wanted to say he was guilty because he was innocent.

XV

Upon information and belief, respondent denies the allegation in paragraph 7 of petitioner's affidavit that he told the court he was pleading guilty because his trial attorney told him many times that he had no other choice, except to go to prison for a long time.

XVI

Upon information and belief, respondent denies the allegation in paragraph 8 of petitioner's affidavit that his guilty plea was against his will.

XVII

Upon information and belief, respondent denies the allegation in paragraph 12 of the petition that the record leaves "grave doubt and uncertainty" as to whether petitioner understood the proceedings or understood that he was waiving various constitutional rights.

XVIII

Upon information and belief, respondent denies the allegation in paragraph 13 of the petition that the

record is silent on whether petitioner's guilty plea was entered "voluntarily" and "knowingly."

XIX

Upon information and belief, respondent denies the allegation in paragraphs 14, 16, 30, and 33 of the petition that petitioner requested that his trial counsel file a notice of appeal on his behalf.

XX

Upon information and belief, respondent denies the allegation in paragraphs 15, 30, and 33 of the petition and paragraph 9 of petitioner's affidavit that petitioner's trial counsel assured petitioner that she would file a notice of appeal on his behalf at the close of petitioner's November 10, 1993, sentencing hearing.

XXI

Upon information and belief, respondent denies the allegation in paragraph 29 of the petition that petitioner is entitled to relief on the grounds of ineffective assistance of counsel because appellant's trial counsel failed to file a notice of appeal.

XXII

Upon information and belief, respondent denies the allegation in paragraph 8 of petitioner's affidavit that on November 10, 1993, he told the trial court that his October 13, 1993, guilty plea was against his will.

XXIII

Upon information and belief, respondent denies the allegation in paragraph 30 of the petition and paragraph 8 of petitioner's affidavit that following the November 10, 1993, sentencing hearing, petitioner asked his trial counsel whether his guilty plea could be "fixed."

XXIV

Upon information and belief, respondent denies the allegation in paragraph 32 of the petition that petitioner's trial counsel led him to believe that she intended to file a notice of appeal on his behalf.

XXV

Upon information and belief, respondent denies the allegation in paragraph 32 of the petition that by failing to file a notice of appeal on petitioner's behalf, petitioner's trial counsel violated her statutory duty under Penal Code section 1240.1, subdivision (b).

XXVI

Upon information and belief, respondent denies the allegation in paragraph 33 that petitioner should be granted relief because he was denied due process of law as a result of trial counsel's failure to file a notice of appeal.

XXVII

Except as expressly admitted herein, respondent denies each and every allegation of the petition and the accompanying affidavit and specifically denies that any of petitioner's rights have been violated in any manner.

XXVIII

On the date this answer is filed, respondent will lodge with this Court all available transcripts of all pertinent proceedings.

WHEREFORE, respondent requests that the petition for writ of habeas corpus be denied.

DATED: November __, 1995

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

J. ROBERT JIBSON
Supervising Deputy Attorney General

PAUL E. O'CONNOR
Deputy Attorney General

Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

An information was filed in Fresno County Superior Court, in case number 490730-9, charging petitioner Lucio Flores Ortega with the following: in count one, with violating section 187 (murder); and in counts two and three with violating section 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of section 12022, subdivision (b) (an enhancement for the personal use of a deadly weapon). (RT 10/13/93, 2, 12, 15, 16, 17.)[6]

On October 13, 1993, petitioner pled guilty to the murder count. (RT 10/13/93, 14.) The People moved to dismiss counts two and three (assault with a deadly weapon), and to strike the section 12022, subdivision (b), allegation of personal use of a deadly weapon. (RT 10/13/93, 17.) The trial court took this motion under advisement. (RT 10/13/93, 17.)

On November 10, 1993, the trial court granted this motion and sentenced petitioner to 15 years to life in state prison. (RT 11/10/93, 9, 10.) He also received 267 days of credit: 178 days for actual time and 89 days good time/work time. (RT 11/10/93, 10; Prob. Rpt., p. 8.) He was advised of his appeal rights. (RT 11/10/93, 10-11.)

Petitioner did not timely file a notice of appeal. On March 24, 1994, appellant attempted to belatedly file a notice of appeal. (Notice of Appeal, dated 3/24/94.) On April 8, 1994, the Clerk of the Fresno County Superior Court informed petitioner that his notice was not filed because it was untimely. (Letter of April 8, 1994, from Clerk of the Fresno County Superior

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6. [Footnote 2 of Answer.] "RT" refers to Reporter's Transcript.

Court.) On June 1, 1994, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Fifth Appellate District, which included a motion for leave to file a belated notice of appeal. (Petition for Writ of Habeas Corpus, F021708, filed June 3, 1994.)

On August 12, 1994, the appellate court denied the petition. *In re Lucio Flores Ortega*, No. F021708 (Cal. Ct. App. 5th Dist., filed 8/12/94), p. 4. On September 18, 1994, petitioner filed a petition for writ of habeas corpus in the Supreme Court of California. (*In re Lucio Flores Ortega*, No. S042190 (Cal., filed 9/18/94). On January 18, 1995, this petition was denied. (Order Denying Writ of Habeas Corpus, No. S042190 (Cal., filed 1/18/95). On July 27, 1995, petitioner filed the present petition.

STATEMENT OF THE FACTS

On the evening of May 16, 1993, petitioner and a co-worker had a couple of altercations. Later that evening, the co-worker and some of the co-worker's friends went to petitioner's home, allegedly so the co-worker could talk with petitioner and repair their friendship. Petitioner was not home, so the co-worker and his friends went to a nearby bar. After 30-60 minutes they left the bar. One of the co-worker's friends saw petitioner in the bar's rear parking lot. An additional confrontation ensued, with petitioner brandishing a knife and the co-worker repeatedly firing a gun into the air. The co-worker and his friends decided to return home; at this point, they discovered that a member of their group (Gregorio Lopez) had been injured. Lopez was next to his truck bleeding from a wound to his side, and stated that petitioner stabbed him. Those were Lopez's final words. (Report and Recommendation of the Probation Officer, filed November 1, 1993, pp. 2-3.)

ARGUMENT

Petitioner asserts that his trial counsel rendered ineffective assistance by failing to timely file a notice of appeal, as per her promise. (Petition for Writ of Habeas Corpus, p. 5.) This contention is without merit.

Trial counsel's failure to preserve a defendant's appellate rights may constitute ineffective assistance of counsel. (*Lozada v. Deeds*, 498 U.S. 430, 432 (1991).)[7]

The reasonableness of trial counsel's conduct is determined or at least strongly influenced by the defendant's statements or actions. (*Strickland v. Washington*, 466 U.S. 668, 691 (1984).) Here, a declaration from petitioner's trial counsel indicates that she has no recollection of petitioner expressing a desire to appeal, nor do counsel's contemporaneous notes reflect such a wish. (Declaration of Nancy Kops, ¶ 4; see also letter from Nancy Kops, dated 6/26/95, Petitioner's Exhibit "I".) Trial counsel states that it is her policy to make notes of such requests. (Declaration of Nancy Kops, ¶ 4.) This indicates that petitioner did not make such a request. This eliminates one of the circumstances in which counsel has a duty to file a notice of appeal pursuant to Penal Code section 1240.1.

Further, petitioner's trial counsel states that she

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7. [Footnote 3 of Answer.] Penal Code section 1240.1, subdivision (b), states when trial counsel has a duty to file a notice of appeal. It provides, in pertinent part:

"It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal."

never promised to file a notice of appeal on petitioner's behalf. (Declaration of Nancy Kops, ¶ 5.)

In addition, the transcripts and other documents lodged with this answer indicate that there were no arguably meritorious grounds for an appeal, thus petitioner's trial counsel had no statutory duty to file a notice of appeal on his behalf. (See footnote 3, ante.) Further, these documents show that petitioner's present claim should not be believed as he has shown a willingness to make false allegations. For example, petitioner claims that he did not understand that he faced a sentence of years to life. (Petitioner's Affidavit, Exhibit "A", ¶ 5.) The reporter's transcript belies this claim.

Petitioner's change of plea to guilty to the offense of second degree murder was made on October 13, 1993, while a jury panel was waiting, and was pursuant to a bargain which secured for him a striking of an enhancement (personal use of a knife) and the dismissal of the two assault with a deadly weapon counts. (RT 22 10/13/93, 17.) The transcript of the change of plea discloses that the court felt that petitioner was "playing games with me," that the court was willing to try petitioner, and that petitioner pled guilty despite this. (RT 10/13/93, 4, 7, 8, 14.) Petitioner entered his plea of guilty with a full understanding that the penalty for second degree murder was from 15 years to life in state prison, that he would be deported after he was released from state prison, and that he would be on parole for the remainder of his life. (RT 10/13/93, 9-12.) Moreover, the probation report prepared for petitioner's sentencing spelled out that petitioner's sentence would be from 15 years to life in state prison. (Prob. 5 Rpt., p. 8.) Finally, when petitioner was sentenced on November 10, 1993, petitioner voiced no surprise or objection when the court imposed the sentence of from 15 years to life in state prison. (RT 11/10/93, 10.)

The court transcripts enclosed with this answer effectively rebut petitioner's claim that he did not understand that he would be sentenced to 15 years in state prison. (*See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *Chizen v. Hunter*, 13 809 F.2d 560, 562 (9th Cir. 1986).) This indicates that petitioner is not a credible affiant. His claim that trial counsel promised to file a notice of appeal should therefore not be believed. Further, these transcripts indicate that there were no arguably meritorious grounds for an appeal. Thus, petitioner's trial counsel did not render ineffective assistance of counsel by failing to file a notice of appeal. Accordingly, the Attorney General respectfully submits that the petition for writ of habeas corpus should be denied.

DATED: November __, 1995

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California

—

GEORGE WILLIAMSON, Chief Assistant
Attorney General

PAUL E. O'CONNOR
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Re: Ortega v. Roe No.: F-95-5612

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

ANSWER

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

LUCIO FLORES ORTEGA (J-01040)
Centinela State Prison
P.O. Box 921
Imperial, CA 92251

Each said envelope was then, on November 15, 1995, sealed and deposited in the United States mail in Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 1995, at Sacramento, California.

_____
DECLARANT

ORDER APPOINTING FEDERAL DEFENDER TO REPRESENT PRISONER FILED JULY 12, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner,

v.

ERNEST C. ROE, Respondent.

CV F-95-5612 GEB HGB P

ORDER

Petitioner is a state prisoner proceeding pro se and in forma pauperis with this 28 U.S.C. § 2254 application for writ of habeas corpus. After reviewing the case file, it appears that an evidentiary hearing is necessary, solely on the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf. In light of that finding, the court has determined that the interests of justice require appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B); *see also Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

Accordingly, THE COURT HEREBY:

1. APPOINTS the Federal Defender to represent petitioner;

2. ORDERS the Clerk of the Court to copy the contents of this file and forward it to the Federal Defender;

3. SETS an evidentiary hearing for Friday, November 1, 1996, at 10:00 AM in a Fresno courtroom to be announced. Any objections shall be filed within 30 days of the service date of this order. The court will issue the orders necessary for the appearance of petitioner at the evidentiary hearing at the appropriate

time (and after the expiration of time allotted for objections).

DATED: July 12, 1996

Hollis G. Best,
UNITED STATES MAGISTRATE JUDGE

DECLARATION OF NANCY KOPS
DATED SEPTEMBER 30, 1996

CHARLES P. DREILING
ACTING PUBLIC DEFENDER
COUNTY OF FRESNO
2220 Tulare Street, Suite 300
Fresno, California 93721
Telephone: 488-3546

Attorney for Defendant
Nancy Kops/PD0027

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, No. CIV-F-95-5612-GEB-HGB

Petitioner,

vs. DECLARATION OF NANCY KOPS

ERNEST C. ROE,

Respondent.

I, Nancy Kops, declare and if called to testify would so state:

I am over the age of eighteen (18) years, and I am duly competent to testify that:

1. I am a deputy public defender employed by the Public Defender of Fresno County.

2. The Fresno County Public Defender represented the petitioner, Lucio Flores Ortega, in Fresno County Superior Court case number 490730-9, from May 1993

to November 10, 1993, when petitioner was sentenced. I was petitioner's chief defense attorney.

3. Petitioner pled guilty to second-degree murder on October 13, 1993. He pled guilty in a trial department, just prior to jury selection. A very experienced interpreter went over a change-of-plea form at length with petitioner. The judge who took the plea spent time reviewing the plea form with petitioner prior to accepting his plea. The district attorney dismissed two counts of felony assault with a deadly weapon in exchange for the plea.

4. I kept file notes of conversations that I had with petitioner from August 16, 1993 to November 10, 1993. My notes reflect that I spoke with petitioner on just one occasion between the day he pled guilty (October 13, 1993) and the day he was sentenced (November 10, 1993). My notes reflected that on that occasion, November 9, 1993, I had a twenty-minute interview with petitioner at the jail. I reviewed the probation officer's sentencing recommendation with petitioner. Petitioner was eligible for a grant of probation. However, the probation officer recommended denying probation. It is possible that I told petitioner that he could file of appeal of the sentence if the court sentenced him to prison. It is possible that petitioner said he would want to file an appeal if he was denied a grant of probation. I have no independent recollection of such a conversation. I would not necessarily have made any notations in my file about such a conversation.

If petitioner had told me on November 9 that he wanted to withdraw his guilty plea, such a conversation would have been of significant importance, and I feel that I would have made a notation in my file reflecting such a conversation. I have no memory of such a conversation and there are no notes reflecting such a conversation.

5. I wrote the words "Bring appeal papers" on the front page of the probation report that I reviewed with petitioner on November 9. It is possible that wrote I those words without actually discussing an appeal with petitioner. I remember that in a number of cases which I handled, I wrote "Bring appeal papers" as a memo to myself to remind myself to put the appeal papers in my file before going to the sentencing hearing. I have no independent recollection of whether I wrote those words on petitioner's probation report as a memo to myself or because we discussed filing an appeal.

6. I feel quite certain that if petitioner had told me on November 9 that he wanted to withdraw his plea, I would have brought that to the court's attention on November 10 prior to the court sentencing petitioner. A review of the reporter's transcript of petitioner's sentencing hearing reflects that I did not make a motion on behalf of petitioner to withdraw his plea. This transcript also shows that I argued for a grant of probation, and that I had reviewed the probation report with petitioner the previous day.

7. My file notes do not reflect any conversation with petitioner on November 10 regarding filing an appeal of his sentence. It is possible that there was such a discussion, but I have no memory of it. I believe that if petitioner had told me in court on November 10, 1993, prior to pronouncement of sentence, that he wished to withdraw his plea, I would have made a statement to the court on the record that petitioner wished to withdraw his guilty plea. I believe that if petitioner had told me after pronouncement of sentence that he wished to withdraw his plea, I would have gone to the jail to discuss this matter with him shortly thereafter.

My file notes do not reflect any other communication with petitioner after November 10, 1993. I do not believe that I had any discussion with petitioner

after November 10, 1993, in which I promised to file a notice of appeal on his behalf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed at Fresno, California, this 30th day of Sept., 1996.

Nancy Kops
Chief Defense Attorney
Public Defender's Office
of Fresno County

WARDEN'S PRE-HEARING BRIEF
FILED JANUARY 10, 1997

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Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	CIV-F-95-5612-GEB-HGB
Petitioner,	**RESPONDENT'S PRE-HEARING BRIEF**
-vs-	Hearing: January 24, 1997
ERNEST C. ROE, Warden,	Time: 10:30 a.m.
	Judge: Hon. Hollis G. Best
Respondent.	

Pursuant to this Court's order filed November 1, 1996, an evidentiary hearing has been scheduled in the

above-entitled matter for January 24, 1997, at 10:30 a.m. in Courtroom 3, United States District Court, Eastern District of California, Federal Building, 1130 "O" Street, Fresno, California.

Pursuant to this Court's order filed July 12, 1996, this hearing is limited to the sole issue of the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf.

In his petition(s), petitioner asserts that his trial counsel, Fresno County Deputy Public Defender Nancy Kops, promised to file a notice of appeal on his behalf.[8] Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 15; pp. 8-9, ¶ 30; p. 12. In an affidavit, attached to his petition(s), petitioner makes the same assertion. Petitioner's Affidavit, p. 3, ¶ 9. Petitioner asserts that trial counsel made this promise at the time of sentencing. Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 15 (promise made at close of sentencing on November 10, 1993); Petition/MPA, pp. 8-9, ¶ 30 (assurance given at close of sentencing); Petition/MPA, p. 12 (promise given at November 10, 1993, sentencing hearing); Petitioner's Affidavit, pp. 2-3, ¶ 8-9 (on November 10, 1993, trial counsel said she would file notice of appeal).

Petitioner's uncorroborated assertions are not sufficient to sustain his claim of ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel is presumed to have rendered effective

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8. [Footnote 1 of Warden's Pre-Hearing Brief.] Petitioner has filed two petitions in this case. One is a six-page form petition asserting his claims in a perfunctory fashion; this was filed July 27, 1995. The other is a typewritten, eighteen-page document which includes a memorandum of points and authorities; this bears no filing date, but appears to have been filed with the first petition. The first petition will be denominated "Form Petition," the second, "Petition/MPA."

assistance. *Id.* at 689. It is the petitioner who must overcome this presumption. *Id.*

The Ninth Circuit has held that "prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1991). *See also United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993). Indeed, the Ninth Circuit has stated that, "[w]e see no principled way to distinguish a failure to file a notice of appeal after a judgment following a plea from a failure to file after a judgment following a trial." *Stearns*, 68 F.3d at 330.

Moreover, in *Stearns* the Ninth Circuit also stated that the issue is whether petitioner "consented to the failure to file a notice of appeal, rather than . . . whether counsel ignored an explicit request to file." *Stearns*, 68 F.3d at 330. But see *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue."); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). Respondent submits that Castellanos states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances. Nevertheless, even under the *Stearns* rule, petitioner's contention fails.

Petitioner must still show that he did not consent to the failure to file. *Stearns*, 68 F.3d at 330. A recent district court opinion from the Eleventh Circuit is instructive. Although *United States v. MacFarlane*, 881 F.Supp. 562 (M.D. Fla. 1995), does not follow *Stearns* with respect to the asserted lack of distinction between

conviction by plea (id. at 565-566), it contains a persuasive discussion of credibility issues analogous to those at bar. In *MacFarlane*, the petitioner asserted that his trial counsel disregarded his instructions to file an appeal.[9] Trial counsel was unable to respond to petitioner's assertions as he died before the evidentiary hearing. *Id.* at 566. Nevertheless, the court reviewed, inter alia, the entry of plea ("rearraignment") transcripts. *Id.* at 566-568. These transcripts belied petitioner's claim of ineffective assistance and his assertion that he was confused at the time he entered his plea. *Id.* at 568, 569.[10] Moreover, the *MacFarlane* court stated:

> The impropriety pleaded as to the failure of [petitioner's trial counsel] to file an appeal is so basic that it strains credulity to believe that the defendant did not know immediately that his request had not been acted upon or that he could not have gained the knowledge by the exercise of reasonable diligence, allowing him to raise this issue at an earlier date and certainly prior to [trial counsel's] death some three years following the sentencing date. *MacFarlane*, 881 F.Supp. at 569.

Likewise, here the failure that petitioner alleges is so basic that it strains credulity to believe that petitioner did not know immediately that his request had not been acted upon. At sentencing, petitioner was advised that

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9. [Footnote 2 of Warden's Pre-Hearing Brief.] MacFarlane made this assertion for the first time some five years after he entered his guilty plea. *MacFarlane*, 881 F.Supp. at 564, 566.

10. [Footnote 3 of Warden's Pre-Hearing Brief.] Further, in these transcripts petitioner stated, inter alia, that he was satisfied with trial counsel's performance. *MacFarlane*, 881 F.Supp. at 567.

he had sixty days in which to file an appeal, and was informed that if he was indigent, counsel would be appointed to represent him. Reporter's Transcript, RPO and Judgment, 11/10/93, pp. 10-11.[11] It strains credulity to believe, as petitioner asserts, that it was not until March 24, 1994, some four-and-one-half months after sentencing, that petitioner realized his requested notice of appeal had not been filed. Petition/MPA, p. 5, ¶ 17.

Further, as noted in respondent's answer, various trial court documents lodged with this Court belie petitioner's assertion that he did not understand that he faced a fifteen-year-to-life sentence when he entered his plea. Compare Petitioner's Affidavit, p. 2, ¶ 5, with Reporter's Transcript, Change of Plea, 10/13/93, p. 12;[12] Probation Report, p. 8. This indicates that petitioner is not a credible affiant. *See, e.g., Marone v. United States*, 10 F.3d 65, 66 (2d Cir. 1993) (upholding district court finding that trial counsel was more reliable than petitioner because throughout the prosecution petitioner had constructed fact scenarios at odds with the evidence). Petitioner's claim that trial counsel promised to file a notice of appeal on his behalf should therefore not be believed.

Moreover, petitioner asserts that trial counsel promised to file a "notice of appeal" on his behalf. Form Petition, p. 5, ¶ 12A; Petition/MPA, p. 4, ¶ 14-15; Petition/MPA, pp. 8-9, ¶ 30; Petition/MPA, p. 12; Petitioner's Affidavit, p. 3, ¶ 9. However, in order to challenge the validity of petitioner's plea, trial counsel

11. [Footnote 4 of Warden's Pre-Hearing Brief.] This Reporter's Transcript was lodged with respondent's answer. Hereafter it will be designated "RT 11/10/93."

12. [Footnote 5 of Warden's Pre-Hearing Brief.] This transcript was lodged with this Court when respondent filed his answer. Hereafter it will be designated "RT 10/13/93."

would have been required to seek a certificate of probable cause pursuant to California Penal Code section 1237.5. Indeed, petitioner asserts that in March 1994, when he submitted a notice of appeal, he also requested a certificate of probable cause. Petition/MPA, p. 5, ¶ 17. Petitioner's failure to assert that there was any discussion with trial counsel about obtaining a certificate of probable cause belies his assertion that an appeal was discussed.

Trial counsel's declaration of September 30, 1996, further supports respondent's position.[13] This declaration states that if petitioner had told trial counsel on the day of sentencing (November 10, 1993), prior to pronouncement of sentence, that he wanted to withdraw his plea, trial counsel would have made a statement to the court on the record reflecting this. Exhibit A, p. 3, ¶ 7. Further, the declaration states that if petitioner had told her after pronouncement of sentence that he wished to withdraw his plea, trial counsel would have gone to the jail to discuss the matter with him shortly thereafter. Exhibit A, p. 4, ¶ 7.

13. [Footnote 6 of Warden's Pre-Hearing Brief.] This declaration had been attached as "Exhibit A." Further, a memorandum concerning a recent telephone conversation between respondent's counsel and trial counsel has been attached as "Exhibit B." While trial counsel acknowledges an inconsistency between her 1995 and 1996 declarations, most of her statements are consistent with her prior declarations. Moreover, some of the trial counsel's statements strengthen respondent's position. For example, trial counsel's statement that if she had promised to file a notice of appeal she would have done so. Or her statement that she does not recall any discussions regarding a certificate of probable cause. In addition, trial counsel states that if petitioner wanted to file a notice of appeal, then on the day of sentencing, trial counsel would have had petitioner sign the appeal papers, or if she did not have appeal papers with her, she would have brought them to the jail.

Further, trial counsel's lack of recollection concerning appeal-related discussions does not entitle petitioner to relief. *See, e.g., Hams v. Pulley*, 885 F.2d 1354, 1368 (9th Cir. 1988) (attorney's failure to introduce mental defense evidence could have been a thoughtful, tactical decision; petitioner's ineffectiveness claim fails despite counsel's lack of recall); (*Rhodes v. Estelle*, 582 F.2d 972, 973-974 (5th Cir. 1978) (petitioner's uncorroborated testimony as to the actions of his attorneys did not meet his evidentiary burden despite the death and lack of recall of pertinent witnesses); *Thomas v. Newsome*, 646 F.Supp. 583, 588 (M.D. Ga. 1986) (despite attorney's lack of recall of petitioner's statements, district court credited him over petitioner).

The declaration of the trial court interpreter also supports respondent's position.[14] The interpreter's inability to recall (1) petitioner requesting that trial counsel file a notice of appeal, or (2) trial counsel promising to file such a notice, provides some corroboration that no such statements were made. Exhibit C, p. 2, ¶ 6.

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14. [Footnote 7 of Warden's Pre-Hearing Brief.] Attached as "Exhibit C." Respondent has only a photocopy of the interpreter's declaration. Respondent has mailed a new, unsigned declaration to the interpreter for her signature. This declaration is identical to the one already signed and attached.

Petitioner will not be able to meet his burden of showing that trial counsel promised to file a notice of appeal on his behalf. His claim of ineffective assistance of counsel shall therefore fail.

Dated: January 9, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

ARNOLD O. OVEROYE
Senior Assistant Attorney General

J. ROBERT JIBSON
Supervising Deputy Attorney General

PAUL E. O'CONNOR
Deputy Attorney General

Attorneys for Respondent

TRANSCRIPT OF PROCEEDINGS,
EVIDENTIARY HEARING ON JANUARY 24, 1997,

[START OF TRANSCRIPT - PAGE 33, LINE 9]

NANCY KOPS, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please state your name for the record and spell your last name.
THE WITNESS: Nancy Kops, K-o-p-s.
MS. SPEAKER: Your Honor —
THE CLERK: Please have a seat.
MS. SPEAKER: — I'm also a witness in this case. Should I not be present?
MS. VORIS: I have no objection to her presence.

DIRECT EXAMINATION

BY MS. VORIS:
Q. Ms. Kops, where do you work?
A. For the Fresno County Public Defender's Office.
Q. And were you so employed in 1993?
A. Yes.
Q. Did you represent Mr. Flores Ortega?
A. Yes, I did.

[TR. 34]

Q. And what was the — what crime were you representing him on?
A. There were actually three crimes. There was a charge of murder. There was another charge of — or there were two charges of assault with a deadly weapon. So there were a total of three charges.

Q. Was — did Mr. Ortega have some difficulty in understanding the proceedings?
A. Which proceedings?
Q. The sentence — the entire proceedings?
Did you have difficulty communicating with him during the pendency of his case?
A. I would say I did not have difficulty — well, strike that. Let me rephrase that.
I would have difficulty in getting responses to the questions that I asked of him.
Q. What is your office policy, if there is one, regarding appeals in murder cases?
A. I don't know — I can't say that there is an office policy.
Certainly, if — I would say my own policy — do you want my own policy?
Q. Yes.
A. If a person went through a trial, I think I would file an appeal in all cases of a murder conviction as the result of a

[TR. 35]

verdict of guilty on a murder case.
With respect to a guilty plea, personally, if a defendant, after having entered a plea of guilty were to tell me that he wanted to withdraw his plea of guilty, I would bring that to the Court's attention before sentencing.
Q. We're not talking about —
A. Are you —
Q. — a withdrawal —
A. No.
Q. — of a plea.
A. Okay.
Q. I'm talking about an appeal. If the —
A. Of the sentence?

Q. An appeal.
A. Well, there would be two aspects, in my opinion, of the appeal. One would be the appeal of the plea, the entry of the plea itself. If the defendant — that would be one portion of an appeal. If a defendant had pled guilty and thereafter voiced concerns about having entered a plea of guilty, that would be one type of an appeal.

However, if there — if that was not the issue but there could be an appeal of the sentence — and is that the question you're asking me?
Q. I'm just wondering what you would do in such a case.
A. With respect to filing an appeal of the sentence?

[TR. 36]

Q. With respect to filing an appeal in a plea case. In any plea case.

Would you do so?
A. Again, with respect to the plea — the entry of the plea itself, if — I would not file an appeal of the entry of the plea unless the defendant voiced concerns that he wanted to withdraw the plea.

With respect to the sentence, I would not always file an appeal of the sentence. In a murder — if a defendant pled guilty to a charge of murder and he were sentenced to prison and denied probation, if probation were a possibility, I personally would not automatically file an appeal of the sentence.
Q. This plea, do you remember the plea in this case? Or have you reviewed the transcript of the plea in this case?
A. This morning, I reviewed a transcript of the change of plea, yes.
Q. And it was a difficult change of plea to get through, wasn't it?
A. Yes, it was.

Q. Did you, after the change of plea, talk to Mr. Flores Ortega?
A. On the very same day of the plea?
Q. Between the plea and the sentence, did you talk to him?
A. Okay. I do not have an independent recollection of it.

[TR. 37]

But I have reviewed my notes, and I believe I provided copies of the — my — all of the notes that I made.

I interviewed Mr. Flores on one occasion between the entry of the plea and the sentencing, and that was the day before sentencing. I reviewed the sentencing report with Mr. Flores.
Q. And at that time, did you explain through the interpreter what his sentence was going to be?
A. I explained, I'm sure. I don't — again, I don't have the — a recollection. But I'm sure I went over everything on the form, and the report was recommending a prison sentence.
Q. And do your notes reflect whether he objected to the sentence or was upset about the sentence that was being proposed in the presentence report?
A. I've reviewed my notes. And my notes simply say that I reviewed the report with him.
Q. Okay. I am going to hand you a document which has not previously been marked, but which Mr. O'connor has reviewed.

Do you recognize that document?
A. Yes. That is the sentencing report that I went over with Mr. Flores.
Q. And is that your handwriting in blue ink at the bottom?
A. Yes, it is.
Q. And what does it say?

A. It says, in one portion, "Bring appeal papers." And on the other — the bottom of the first page, my own notes:

[TR. 38]

> "No record. Felix humiliated. Felix had weapon, which he exhibited. Victim had been drinking" — the abbreviation for had been drinking — "at bar with Felix. Children. Works."

Q. And then there's a little notation that says, "Health problems."
A. "Health problems."
Q. Were those arguments that you anticipated presenting to the judge —
A. Yes.
Q. — in — I'm sorry — in response to the presentence report?
A. Yes. Those are arguments that I was going to make to the court, and I believe I did make. I reviewed the sentencing transcript as well. Arguments that I made to the court regarding why I believed Mr. Flores should be considered for a grant of probation.
Q. Having seen the — what sentence did he ultimately receive?
A. A 15-year state prison sentence. Fifteen years to life.
Q. Did you — what does the notation "Bring appeal papers" mean to you?
A. It meant that I was telling myself as a reminder to take appeal papers with me the following day to court for Mr.

[TR. 39]

Ortega to sign.

Q. And did you in fact do so?
A. No. I mean, I believe I must not have, because if an appeal was not filed, I must not have taken them —
Q. So the —
A. — over there.
Q. — ordinary procedure would be that you would bring the appeal papers to court and have him sign them, and then file them for him in pro per.
A. No. I would, as a matter of convenience. If an appeal was going to be filed, I would take the appeal papers with me to court and have my client sign them in court out — as a matter of convenience to myself so that I would not later have to go over to the jail. And then I would file those appeal papers on the fourth floor in the Superior Court Clerk's Office.
Q. And did you say to Mr. Flores Ortega, if you know, that you would file the appeal papers?
A. I have no memory of that. And I believe that a — it's certainly possible on the day before sentencing when I reviewed the probation report with Mr. Flores and in discussing the fact that the probation officer was recommending a state prison sentence and in discussing the fact that statutorily he was eligible for a grant of probation, it is certainly possible that I could have told him that he could file an

[TR. 40]

appeal or I could file an appeal if the court granted him — did not grant him probation.

MS. VORIS: I have no further questions.
Your Honor, I would — if I may, I'd like to —
THE COURT: Mr. O'Connor?
MS. VORIS: — enter this as an exhibit.
THE COURT: Have any questions at this time?
MR. O'CONNOR: Oh. Yes, Your Honor.

MS. VORIS: Your Honor, I'd like to have this marked and —

THE COURT: Do you wish to offer this in evidence?

MS. VORIS: Yes.

THE COURT: All right. It will be received.

THE CLERK: That will be Exhibit A.

THE COURT: Be Plaintiff's Exhibit —

THE CLERK: A.

THE COURT: — A.

This appears to be the original report.

THE WITNESS: It is.

THE COURT: And your original notes; is that correct?

THE WITNESS: That's correct.

THE COURT: All right. Would you like to have this, or do you have a copy?

MR. O'CONNOR: I have a copy. Thanks.

///

[TR. 41]

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q. All right, Ms. Kops. Do you believe that you ever promised to file a notice of appeal on Mr. Ortega's behalf?

A. When you use the word "promise," I would say I don't believe that I promised Mr. Ortega that I would file a notice of appeal on his behalf.

Q. All right. If you had promised to file a notice of appeal, would you have done so?

A. I believe, knowing myself, that if I had promised to file a notice of appeal, I would have followed through and done so.

Q. All right. Is filing a notice of appeal a difficult task?

A. No.

Q. All right. Could you describe the process of filing a notice of appeal.

A. With respect to a sentence? Filing a notice of appeal with respect to a sentence, as in this case, there is a form which is approximately four or five pages in length. And I would fill out my client's name, the case number, his location as being in custody. I would put a check mark or an X in a few different places. And I would have my client sign his name in two different places.

And then I would take it to the fourth floor of the courthouse to the Clerk's Office. And I would hand it to a clerk there and get a copy and have a copy of the front page in my file showing that I

Kops - Cross

[TR. 42]

had filed such a notice.

Q. All right. And you have filed notice of appeal — notices of appeal before in other cases, correct?

A. Yes.

Q. All right. If you had promised to file a notice of appeal and you had the appeal papers with you at sentencing, what would you have done?

A. I would have had Mr. Flores sign in the two different places where he would need to sign. And then I would have taken that form to the fourth floor and filed it with the Clerk.

Q. All right. And if you had promised to file a notice of appeal and you didn't have the appeal papers with you at sentencing, what would you have done?

A. I would have obtained a copy of the notice of appeal from my office and taken it over to the jail with an interpreter from my office and had Mr. Flores sign the papers and then filed the notice of appeal.

Q. All right. And if you had — well, let's see. Do you

believe that the petitioner ever asked you to file a notice of appeal on his behalf?
A. Well, again, in the conversation the day before sentencing, when we discussed the recommended sentence of 15 years to life and the fact that that's what the court would, in all likelihood, give him, and the fact that he was statutorily

[TR. 43]

eligible for probation, he may have said words to the effect that he wanted probation.

Again, I don't recall that specifically. But he certainly may have. And I might very well have said, "Well, we can file an appeal if you are denied probation."
Q. All right. But you have no recollection of this.
A. I don't have a specific recollection of that conversation.
Q. All right. And would you have encouraged him to appeal his sentence?
A. I would not have, in my own mind, encouraged him to file an appeal of the sentence.
Q. Okay. And why not?
A. I would —

MS. VORIS: I would object on the grounds of relevance.

THE COURT: Overruled.

THE WITNESS: The question was why would I not have?
BY MR. O'CONNOR:
Q. Yeah. Why would you not have encouraged him to file an appeal of his sentence?
A. I personally don't think I would have encouraged him because I would have expected an appeal of the sentence not to have been — I mean, the appeal would

not have been granted. Or the sentence would not have been reversed. That would be my —

[TR. 44]

Q. And —
A. — feeling.
Q. And you were certain that the sentence would not be reversed; isn't that right?
A. Well, I would feel quite certain of that, yes.
Q. Right. This was a murder case, and the only grounds for appealing the sentence would be that the judge abused his discretion in denying probation; isn't that right?
A. Yes.
Q. And in your opinion, that is not a claim which is likely to succeed on appeal.
A. Correct.
Q. In fact, it would almost certainly fail.
A. That would be my belief, yes.
Q. Okay. Now, regarding the "Bring appeal papers" notation on the probation report, it's possible that you wrote this simply as a memo to yourself without discussing an appeal of the sentence; isn't that right?
A. That it's possible. I mean, I have a recollection over the course of years of sometimes writing that as a memo to myself so that I will bring appeal papers over if there is a possibility — such as in this case, there is a possibility of an appeal being filed because of the probation being a potential — it's an option.
Q. Okay. All right. And that is just as possible as a

[TR. 45]

scenario where you wrote the "Bring the appeal papers" notation as the result of a discussion about an appeal.
A. Both are possibilities.

Q. Both are possibles.
One is no more possible than the other.
A. It's hard for me to say if one is more possible than the other.
Q. Okay. Now, if the petitioner asked you to file a notice of appeal and you had appeal papers with you at sentencing, what would you have done?
MS. VORIS: Your Honor, asked and answered.
MR. O'CONNOR: Well —
THE COURT: Sustained.
MR. O'CONNOR: — it's — okay. All right.
BY MR. O'CONNOR:
Q. Okay. Now, if the petitioner felt his plea was involuntary and he wanted to go to trial, one possible remedy was to move to withdraw his plea; isn't that right?
A. Yes.
Q. All right. Do you believe that petitioner ever asked you to move to withdraw his plea?
A. No.
Q. All right. And let's see. November — according to your notes, November 9th, 1993, the day before sentencing, was the only time between the entry of plea and the sentencing hearing

[TR. 46]

that you spoke to the petitioner, correct?
A. Yes.
Q. All right. Now, if on November 9th, 1993, the petitioner said he wanted to withdraw his plea, what would you have done?
A. I believe that I would have brought this to the court's attention prior to the court pronouncing sentence. That would have been the appropriate thing for me to do. And I believe I would have done that.

Q. All right. And would you have made notes of such a conversation?
A. I can't swear I would have made notes. But I think if my client had firmly said he wanted to withdraw his plea, there is a probability I would have noted that.
Q. All right. A high probability?
A. You're saying if he had said this the day before in that conversation —
Q. Right.
A. — would I have noted that?
Q. Right.
A. Again, I think I would have. How high the probability is, I don't know.
Q. Okay. And you have no notes of such a conversation.
A. That's correct.
Q. Okay. Now, if on November 10th, 1993, the day of sentencing, prior to the pronouncement of sentence, appellant — or

[TR. 47]

excuse me, petitioner indicated to you that he wished to withdraw his plea, what would you have done?
A. Again, it would have been appropriate for me to bring this to the court's attention before the court pronounced sentence. And I believe that's what I would have done.
Q. Okay. And you would have made a statement on the record to that effect.
A. Yes.
Q. All right. And have you reviewed the transcript of the sentencing hearing?
A. I did that several months ago, yes.
Q. All right. And was there any indication on the record that you brought this to the court's attention?
A. No. There was no such indication on the record.

Q. All right. Okay. And if on November 10th, 1993, after pronouncement of sentence, the petitioner had indicated to you that he wanted to withdraw his plea, what would you have done?
A. If he had told me after sentencing that he wanted to withdraw his plea?
Q. Right.
A. I think I would have felt the need to discuss this with him. And I believe that it would have been unlikely I could have accomplished such a — well, I don't know if I could have done that in the courtroom.
Q. All right.

[TR. 48]

A. But I probably — again, I might very well have gone over to the jail thereafter to talk to him about that.
Q. All right. But you would have had further discussions with him at the jail; is that correct?
A. Yes. I believe I would have done that.
Q. All right. And you had no such discussions, correct?
A. There — I don't recall that. And there is nothing in my file to indicate from my notes that I went over to the jail to talk to him about such a matter.
Q. All right. And you don't believe that any further discussions occurred.
A. I don't believe they did, no.
Q. All right. Okay. Now, to attack the validity of petitioner's guilty plea on appeal, you would have needed to have sought a certificate of probable cause; isn't that correct?
A. Yes.
Q. All right. Do you believe that you ever promised to seek a certificate of probable cause on petitioner's behalf?
A. No. I'm sure I did not.

Q. Okay. Do you believe that petitioner asked you to seek a certificate of probable cause?
A. No.
Q. All right. Do you recall — do you believe you had any conversations with petitioner concerning a certificate of probable cause?

[TR. 49]

A. No.
Q. All right.
THE COURT: Excuse me, Mr. O'Connor. Are you going to be much longer with this witness?
MR. O'CONNOR: No. Actually, I think I'm finished.
THE COURT: Fine. Do you have any —
MS. VORIS: Your Honor, I do have a couple of questions. I don't think they'll be more than —
THE COURT: Well, it's —
MS. VORIS: — five minutes or so.
THE COURT: — twelve o'clock. But we can finish with the witness.
(Discussion off the record)

REDIRECT EXAMINATION

BY MS. VORIS:
Q. Ms. Kops, does the fact that you might not encourage someone to file a notice of appeal prevent you in any way from filing one?
A. No. It wouldn't prevent me from filing one. If my client asked me to, I would — whether I had encouraged it or not, I would still go ahead and file it.
Q. In fact, in probably most cases, particularly where there's a plea, your legal advice might be that you won't win, but you would still file the notice of appeal; is that correct?

[TR. 50]

A. If my client asked me to, yes.
Q. And your notes to "Bring appeal papers" could indicate to you that there was some discussion of appeal.
A. Yes.
Q. Given the difficulty in the change of plea, which appeared to me that on nearly every page of the plea he made a statement such as — that he didn't really want to plea and that he was pleading because his attorney told him to and things like that — does that refresh your recollection about dealing with Mr. Flores Ortega and the interview — the postplea presentence interview?
A. No.
Q. So you didn't go in there kind of — with a feeling that there might be some problems with his comprehension of the procedures.
A. Going to the —
Q. I'm sorry. When you went to discuss his sentence with him —
A. Yes.
Q. — having had this very difficult plea, did you have it in your mind that there might be some problems, given the recommended sentence?
A. Okay. I don't have a specifically — a specific memory of what my state of mind was. But I — it's possible that I anticipated anything. I don't know.

[TR. 51]

Q. Now, do you believe that you wrote those notes the day before you went to court for the sentencing? The note that you wrote on the presentence report.

A. I would estimate I probably did write it the day before.
Q. And it is possible that you wrote those notes and then just forgot to bring the appeal papers, isn't it?
A. Right. That's possible, yes.
Q. And it's possible that with the press of business, that you didn't even see the notes and forgot to go over to the jail to then get him to sign the appeal papers after you forgot to bring them to court.
A. I would say it's possible. But I would also say if I made a promise that I would file an appeal, I would not forget a — I would be unlikely to forget a promise.
Q. Let's say that the — hypothetically, the conversation was that Mr. Flores Ortega said, "I'm not guilty. How could I do 15 years?" Given his plea that — that's a possibility that he would use words such as that, isn't it?
A. He certainly could have said that.
Q. And is it possible that you could then have said, "If you are sentenced to 15 years, we will file an appeal"; is that correct? Would that be a way that the conversation could have gone?
A. It's possible.
Q. When you have an upset client, do you discuss appeal with

[TR. 52]

him? Even if —
A. Well, certainly.
Q. — you don't recommend it.
A. Certainly. I mean, that would be — an appeal of the sentence is something that certainly could have come up in that conversation that I had with him.
Q. And it could have been that you said, "I will get the appeal papers for you and bring them to court tomorrow."
A. It's possible, yes.

Q. And though you believe that if you had made such a promise, you would have remembered, it's possible that you didn't.
A. I guess it's the word "promise" that's a little bit — we could have had such a discussion like you just recited, and I forgot. I did not bring the appeal papers. I believe I didn't bring them.
Q. So let's take the word "promise" out and assume that that was a word inserted either by Mr. Flores Ortega or by the person who prepared his papers. And have it be that you said, "If you're not happy with the sentence, we can file an appeal."

Is that a likely scenario?
A. That certainly is a very good possibility that something similar to that could have been — I could have said that.
Q. And you would have written "Bring appeal papers" on your sentencing memo at that time. And then —

[TR. 53]

A. I could have, at that time, yes.
Q. And then —
A. I could have.
Q. — it's possible that you forgot to bring the appeal papers.
A. Yes.

MS. VORIS: I have no further questions.
THE COURT: Anything further?
MR. O'CONNOR: Nothing further.
THE COURT: Ms. Kops, couple questions.
THE WITNESS: Okay.

EXAMINATION

BY THE COURT:
Q. First of all, how long with you been with the Public

Defender staff in Fresno County?
A. Since January 14th, 1977.
Q. And how long have you been defending criminal felony cases?
A. I would say since maybe about 1980.
Q. In 1993 at the time of the sentencing in this case, did you have an office policy with reference to advising your clients or clients of the office of their rights of appeal?
A. I don't believe we have a very concise policy that I have ever been told.
Q. Did you personally have a policy in that regard?

Kops - Examination

[TR. 54]

A. I would not describe my policy as a strict policy. But certainly, if I discussed with a client and I were — I told a client, "I will file an appeal," I believe my policy would be to always follow through on my promise. But —
Q. Would you have — in every case where a client has been either convicted or entered a plea of guilty to a felony, would you have advised that client of their rights of appeal?
A. To the sentence? An appeal of the sentence?
Q. Yes. Or — either one. They have a right of appeal from entering a plea.
A. Right. I — no. My personal policy is that if a client has entered a plea and does not thereafter voice to me a change of heart, I would not discuss the right to appeal of his plea under those circumstances.
Q. Would you have discussed with a client his right of appeal from the sentence?
A. If — certainly, if there is a range of options and I feel that he has a chance — well, let me try and phrase this.

Under some circumstances, yes.
Q. But not in every case.
A. But not in every case.
Q. Okay.
A. If —
Q. To your recollection — and you've reviewed the transcript of the sentencing hearing — was this plea entered as a result

[TR. 55]

of a plea bargain?
A. Yes. There was a plea bargain.
Q. Was it a bargain with reference to sentence as well as a plea of what count?
A. No. The bargain was that the charge would be a second degree murder. The knife enhancement was stricken. And the two other charges of 245(a) were to be dismissed. That was the bargain.
Q. And so the matter of sentencing would have been left up — strictly up to the court.
A. Right.
Q. Okay. Do you have a personal recollection at this time of having any discussion with Mr. Ortega following the pronouncement of sentence in this case while you were still in court?
A. No. I have no such recollection.
THE COURT: Thank you.
Any further questions by Counsel?
MS. VORIS: I have two more questions.

REDIRECT EXAMINATION

BY MS. VORIS:
Q. One, Ms. Kops, did you hand me that presentence report with your signature — with your handwriting on it this morning here in Court?

A. Yes.
Q. And did that come from your file?

Kops - Redirect

[TR. 56]

A. Yes.
Q. And are you familiar with Penal Code Section 1240.1 regarding the obligations of an attorney who is appointed with regard to a filing of timely notice of appeal?
A. With respect to that particular Penal Code section, I can't say I can quote it to you, but —
Q. And would it surprise you if you heard that there were other public defenders who make it a policy to file a notice of appeal in every murder case?
A. With respect to the sentence?
Q. That they file a notice of appeal in murder cases.
A. Well, I guess it would be with respect to what specifically? It might surprise me —
Q. Okay.
A. — if on a plea.
MS. VORIS: Thank you.
THE COURT: All right. May this witness be excused?
MS. VORIS: Yes.
THE COURT: Mr. O'Connor?
MR. O'CONNOR: Nothing further, Your Honor.
THE COURT: All right. May she be excused from the hearing?
MR. O'CONNOR: Yes.
THE COURT: All right. You are excused —
THE WITNESS: Okay.

[TR. 57]

THE COURT: Ms. Kops
THE WITNESS: Thank you.

(Whereupon, the witness was excused)

[END OF TRANSCRIPT - PAGE 57, LINE 3]

**TRANSCRIPT OF PROCEEDINGS,
EVIDENTIARY HEARING ON JANUARY 24, 1997,**

[START OF TRANSCRIPT - PAGE 68, LINE 9]

PLAINTIFF'S CLOSING STATEMENT

MS. VORIS: Your Honor, petitioner has made the argument in this petition and in this Court that Ms. Kops indicated to him that she would file a notice of appeal. It was clear to Ms. Kops and probably — and I would say to the Interpreter and to anyone who came in contact with this defendant that he did not have a clear understanding of procedures or of the nature of what was going to take place.

I think that based on her notes, there was a discussion about a notice of appeal. And for whatever reason, whether it was because she forgot or failed to get over to the jail, a notice of appeal was not filed.

Whether it was phrased in the form of a promise or whether it was phrased in the form of a statement, I think that there was a discussion of appeal and that Mr. Flores Ortega had a legitimate expectation that the notice of appeal would be filed.

[TR. 69]

I think that his weight of — I believe the Attorney General stated it, of four months under the circumstances was not even an unreasonable time to then contact somebody and find out what had happened with his appeal when he found out that time had passed.

He had someone write a letter to his attorney, and that letter is in the record, asking what happened to his

appeal? Where was it? And the response was that he had not asked her to file one, I believe. I'm paraphrasing.

But what I think happened and I think was clear from the evidence on the record was that there was a discussion of an appeal, that Ms. Kops was supposed to bring the appeal papers, that she under ordinary circumstances would have, that she forgot, that she did not then go over to the jail with appeal papers, or she closed the file and let it go, and it didn't get filed.

Due to his inability to communicate clearly and his drafter's inability to communicate clearly, perhaps when it went to the Fifth District it was not articulately stated for the Court of Appeal that she — that Ms. Kops had said she would file the appeal. I think that when he said the — that she had not explained procedures, that it is not even a conflict between the two statements to say that she didn't explain the procedures and the time limits and she also said she was going to file it so that would explain why she didn't

[TR. 70]

explain the procedures and the time limits.

I think at under the circumstances, Mr. Flores Ortega should be permitted to file his notice of appeal and be permitted to proceed as though his judgment were entered from this point.

THE COURT: Let me ask you this: The petitioner has the burden of proof in these cases. And in this case, the petition alleges, at least, that the attorney failed to keep her promise and file a notice of appeal.

What would be your position if the Court determines, based upon the evidence presented, or should determine that the petitioner has not carried his burden of proving that particular allegation?

MS. VORIS: Well, I would disagree. I think —

THE COURT: Well, just assume that.

MS. VORIS: Assuming — what would be our position if we said that if the Court said —

THE COURT: Would that end this case?

MS. VORIS: Would that end this case? I — to be candid, Your Honor, I'm not sure whether it would end —

THE COURT: What do we do with —

MS. VORIS: — this case.

THE COURT: — with the decision in *Sterns*?

MS. VORIS: I'm sorry?

THE COURT: In *U.S. v. Sterns*.

[TR. 71]

MS. VORIS: *Sterns*. I believe under — now, I have to be candid that at lunchtime I went and ate lunch and I did not go read *United States v. Sterns*. But I think that it's quite clear that he did not consent to a failure to file a notice of appeal.

THE COURT: But that's not the allegation.

MS. VORIS: That's true. But I think under the circumstances — I think — and I may be incorrect on this, but I think that the allegations can be read broadly to say, well, it did not contain, perhaps, a promise, which was the word which Ms. Kops, I think, had a problem with. She didn't say, "I promise you that I will go file a notice of appeal."

I think she may have said, "I will file a notice of appeal." But she may not have said, "I promise."

And I think that *Sterns* may leave it open, that he clearly did not consent to a failure to file a notice of appeal. And I would ask that the petition be amended to reflect that.

THE COURT: Well, I'm not going to entertain that motion at this time.

MS. VORIS: Okay.

THE COURT: Thank you.
MS. VORIS: Thank you.
THE COURT: Mr. O'Connor?
MR. O'CONNOR: Yes, Your Honor.

[TR. 72]

DEFENDANT'S CLOSING STATEMENT

MR. O'CONNOR: It's clear in this case that the petitioner has failed to meet his burden that would sustain his allegation. His assertion here is simply not credible.

This assertion about the broken promise with regard to filing notice of appeal was not made in his Fifth District petition. In fact, it's our position that it was contradicted by his assertion that his attorney told him nothing about appeal procedures.

He said during my cross-examination that he had the assistance of an interpreter while preparing this Fifth District petition. So — and it's furthermore not credible that he would sign it without knowing what his — what the contents of it were. Let's see.

Also, he failed to follow up on the purported request for a notice of appeal in a timely manner. Also, he makes no mention of a certificate of probable cause or a motion to withdraw a plea in his petition.

It would have been a simple task for the defense attorney to file the notice of appeal. Ms. Kops indicated she would have filed the notice of appeal at the sentencing hearing if she had had the appeal papers. If she hadn't had the appeal papers with her, she would have gone to the jail and discussed the matter with him. She didn't do these things or doesn't believe that she did these things, and this

[TR. 73]

supports the inference that there was no promise.

The interpreter's lack of recollection of discussions concerning an appeal also provides some corroboration for our position.

With regard to an appeal of the sentence, the petitioner is not asserting in his petition that he wanted to attack his sentence. He's asserting that he wanted to attack the validity of his plea, that his plea was involuntarily entered. So the lack of — so really, this whole issue about appealing the sentence is a red herring.

As to the "Bring appeal papers" notation on the probation report, Ms. Kops testified that it was equally probable that this simply could have been a memo to herself to bring appeal papers and that this could have occurred without the discussion of an appeal.

And so I think that the petitioner has failed to meet his burden in supporting his assertion regarding a broken promise with respect to a notice of appeal.

THE COURT: How would you answer the same questions that I asked —

MR. O'CONNOR: Well —

THE COURT: — Ms. Voris?

MR. O'CONNOR: — I think there is absolutely no evidence supporting the position that he did not consent to abandoning his appeal. There is, you know, nothing in his

[TR. 74]

behavior until March of '94, well after the expiration of the appeal period, that indicates that he was in any way interested in filing an appeal or pursuing an appeal. So there is simply no evidence that he did not abandon his appeal.

So I think that even under *Sterns* the petitioner is not entitled to relief.

THE COURT: Well, I don't know. It appears to me that the facts of this particular case are very, very close to those in *Sterns*. *Sterns*, it was a plea case. The allegation in *Sterns*, if I read it correctly, was that he did not consent to his trial counsel's failure to file a notice of appeal.

Well, that is not the allegation in this case. But as the court — the Ninth Circuit states in this opinion — and I'm now reading from 68 F.3d at page 330:

> "Again, however, we have said that the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal, rather than on whether counsel ignored an explicit request to file. Of course, Sterns said that he did make a request. But he need only show that he did not consent to the failure to file."

The evidence in this case is, I think, quite clear that there was no consent to a failure to file.

[TR. 75]

MR. O'CONNOR: Well, Your Honor, I —

THE COURT: There's no testimony that way.

And what I'm afraid of here, even if I should find that the petitioner has not sustained his burden in proving the specific allegation — i.e., the breach of a promise to file a notice of appeal — I'm afraid the Ninth Circuit would clearly say the circumstances of this case are such that he did not consent to the failure to file a notice of appeal. And therefore, the result would be the same as in *Sterns*.

MR. O'CONNOR: Yeah. Well, I —

THE COURT: And I'm not — I don't think — that's why I asked this question, because I'm not sure —

MR. O'CONNOR: Right.

THE COURT: — of course.

MR. O'CONNOR: Well, I think perhaps we can infer from the circumstances that his complete inaction with regard to an appeal indicates that he did consent to the failure to file an appeal.

THE COURT: But I think — I might as well tell you:

From the evidence presented, I do not find as — that the petitioner has proven by a preponderance of the evidence the specific allegation in the complaint.

It's clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game.

[TR. 76]

I think there was a conversation in the jail. Mr. Ortega testified, and I'm sure he's testifying as to the best of his belief, that there was a conversation after the pronouncement of judgment at the sentencing hearing where it's his understanding that Ms. Kops was going to file a notice of appeal.

She has no specific recollection of that. However, she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had Mr. Ortega requested that she file a notice of appeal, she would have done so.

But I cannot find that he has carried his burden of showing by a preponderance of the evidence that she made that promise.

But — so I'm going to do this: I am going to ask you to brief the questions that I just asked.

MR. O'CONNOR: Thank you, Your Honor.

THE COURT: And would you like to do it simultaneously, or would you like to do back and forth?

MS. VORIS: I have no preference in that regard. I think if it's — obviously, it doesn't matter, because I would be first anyway. So —

THE COURT: Right.

MS. VORIS: — it would probably —

THE COURT: Mr. O'Connor, what's your preference?

[TR. 77]

MR. O'CONNOR: Again, no preference.

MS. VORIS: It would probably —

THE COURT: Why don't we just file — please, how much time would you like?

MR. O'CONNOR: Well, I think it takes a couple of weeks to prepare a transcript, so —

THE COURT: I'm sorry?

MR. O'CONNOR: It takes two weeks to prepare a transcript normally, doesn't it?

THE COURT: That's fine, if that will give you sufficient time.

MR. O'CONNOR: Well, so —

MS. VORIS: We would need to get the transcript, I guess, of this hearing, which would take two weeks. And then I would like to have it sometime in March, I would think.

THE COURT: Sometime in —

MS. VORIS: In March.

THE COURT: — March?

MS. VORIS: For briefing. March or April, either one. Whatever's —

THE COURT: You think you would need that much time?

MS. VORIS: Pardon? I — Your Honor, I have two oral arguments and a trial in February and — which I'll need to prepare for. Two oral arguments at the Ninth. And then after that, I'm fairly flexible. But —

[TR. 78]

THE COURT: Well, since you're requesting it — I wouldn't give him that time, if he had requested — but I'll — if you wish it, I'll give it to you.

How about the 14th?

MS. VORIS: Of March?

THE COURT: Of March.

MS. VORIS: I think that would be —

THE COURT: On or before the 14th of March. That's a Friday.

And Mr. O'Connor, you can file yours on or before the 14th of March also.

MR. O'CONNOR: All right. Very good.

MS. VORIS: Your Honor, and then if we choose to respond to the other's brief, should we set a schedule, or should we just respond within 10 days or —

THE COURT: I'm sorry? Give me again.

MS. VORIS: Would you like us to respond to the other's arguments in brief form? Do a reply brief.

THE COURT: I don't want to preclude it. That's why I asked the original question, whether you wanted to do this in a —well, if — why don't we do this? Let me give you a — if you wish, each of you would have additional week to respond.

MS. VORIS: That's fine.

MR. O'CONNOR: All right.

[TR. 79]

THE COURT: So the matter will stand submitted on March the 21st at 5:00 p.m., whether I receive responses or not.

MS. VORIS: Thank you, Your Honor.

THE COURT: All right?

MR. O'CONNOR: Thank you.

THE COURT: And let me ask you to do this, if you would: File your original in the file here, and then send me a copy at Yosemite.

And you have the address up there, assuming I'm still there?

MS. VORIS: I do.

THE COURT: I'm not so sure after listening to the news about the current weather this weekend. But we'll see.

The address there is P.O. Box 575.

MS. VORIS: Your Honor, would you — just for clarification. I know you want us to address these specific issues.

I, of course, probably not surprisingly, disagree with your finding that we have not met our burden. And I would like to argue that within the context of this brief.

Is that permissible within the context —

THE COURT: I don't —

MS. VORIS: — of this brief?

THE COURT: — think so. I don't think I'm going to

[TR. 80]

change my mind.

MS. VORIS: Okay. So our issue then would simply be whether —

THE COURT: So it's simply the effect of such a

finding, whether that ends the case or whether we have to take into consideration the court's holding in *U.S. v. Sterns*.

It's my — I'll tell you. It's my current feeling that we do. But —

MS. VORIS: Okay.

THE COURT: — maybe you can show me differently.

MR. O'CONNOR: So would the question be —

THE COURT: And if we do — as I've already discussed with you, if I should find that *Sterns* is controlling here — and we have to follow *Sterns* rather than *Castellano* (phonetic) —

MR. O'CONNOR: No. I know.

THE COURT: If I do find that, then the order, of course, would be a conditional order ordering the superior court to refile a judgment which would start the appeal time running again.

MS. VORIS: Thank you, Your Honor.

THE COURT: All right?

MR. O'CONNOR: So more generally, the question would be whether the petitioner is entitled to relief under *Sterns* in light of the ruling today.

[TR. 81]

THE COURT: Yeah.
MR. O'CONNOR: Okay. All right.
THE COURT: Thank you very much.
MS. VORIS: Thank you.
MR. O'CONNOR: Thank you.

(Whereupon, the hearing in the above-entitled matter was adjourned.)

[END OF TRANSCRIPT - PAGE 81, LINE 7]

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

February 3, 1997

Siri L. Panton, Transcriber

WARDEN'S POST-HEARING BRIEF FILED MARCH 14, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner, v. ERNEST C. ROE, Respondent.	CIV-F-95-5612 GEB HGB **RESPONDENT'S POST-HEARING BRIEF**

Pursuant to this Court's order of January 24, 1997, respondent submits the following brief addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 323 (9th Cir. 1995), in light of this Court's finding that petitioner failed to meet

his burden of showing that his trial defense attorney promised to file a notice of appeal on his behalf. Reporter's Transcript of January 24, 1997, Evidentiary Hearing ("RT 1/24/97") 2 (scope of hearing); RT 1/24/97 75, 76 (court's finding); RT 1/24/97, 76, 80, 81 (order regarding briefing). *Stearns* held that even in a guilty plea case, a federal habeas petitioner need only show that he did not consent to counsel's failure to file a notice of appeal. *United States v. Sterns*, 68 F.3d at 330.

Respondent submits that petitioner may not obtain relief under Stearns because it states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989); further, *Stearns* is distinguishable from the present case.

PETITIONER IS NOT ENTITLED TO RELIEF UNDER UNITED STATES v. STEARNS BECAUSE IT STATES A "NEW RULE" BARRED BY TEAGUE v. LANE

Petitioner is not entitled to relief under *United States v. Stearns*, 68 F.3d 328, because *Stearns* states a "new rule" as described by *Teague v. Lane*, 489 U.S. 288. Federal habeas corpus relief will be denied if the claim rests on a "new rule" which was announced after petitioner's case became final. *Teague v. Lane*, 489 U.S. 288, 299-316. A "new rule" breaks new ground or imposes a new obligation on the states if the result was not dictated by precedent. *Id.* at 301. *See also Saffle v. Parks*, 494 U.S. 484, 486 (1990). Finality is defined as the expiration of the time within which to petition for writ of certiorari on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6 (1987). The application of *Teague* is a threshold question. *Graham v. Collins*, 506 U.S. 461, 466-467 (1993).

A three-step test for the application of *Teague's* new rule prohibition is set forth in *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The court first is to look at

the date petitioner's case became final on appeal. *Ibid.* In this case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal which was not filed. His conviction therefore became final on January 9, 1994. *See* Reporter's Transcript of the November 10, 1993, sentencing (lodged with this Court when respondent filed his answer); *see also* Cal. Rules of Court, rule 31(a); Historical Note, 23 pt. 1 West's Cal. Ann. Court Rules (1996 ea.) rule 31(a), 322-325.

The second step is to survey the legal landscape at the time of finality to determine whether the rule petitioner seeks to apply is a new one. *Caspari v. Bohlen*, 510 U.S. 383, 390. Even if the result petitioner seeks is within the "logical compass" of a prior Supreme Court decision (*Butler v. McKellar*, 494 U.S. 407, 415 (1990)), and even if Supreme Court decisions "inform or even control or govern the analysis" of the claim (*Saffle v. Parks*, 494 U.S. 484, 491), it is still a new rule unless the result is actually dictated by pre-existing precedent. The Ninth Circuit recites that a rule is not dictated by precedent where reasonable courts might disagree about its application. *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-1025 (9th Cir. 1991), criticized on different grounds in *Reeves v. Hopkins*, 102 F.3d 977, 984, 985 (8th Cir. 1996); *see also Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995).

At the time of petitioner's case, criminal defendants doubtless had a recognized right of counsel on appeal as a matter of right. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Moreover, *Rodriguez v. United States*, 395 U.S. 327, 330 (1969) had held that in considering the denial of the right to appeal, the issue of prejudice is not to be considered. There was no affirmative duty to advise, however, and, in particular, there was no duty of advice following a plea of guilty. In fact, circuit cases specifically slated that there was no duty to advise of the

right to appeal after a guilty plea. *See, e.g., United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989), abrogated on different grounds in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992); *Morrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985); *see also Belford v. United States*, 975 F.2d 310, 314-315 (7th Cir. 1992) (citing cases), overruled on other grounds in *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (defendant need not show prejudice from failing to appeal); *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992) (exceptions for answering inquiry and constitutional issues). The California Rules of Court only required advice of the right to appeal after a trial or contested probation revocation. Cal. Rules of Court, rule 470.

In the present case, given the legal landscape that existed in January 1994 (e.g., the absence of a duty to advise defendants of appeal rights following guilty pleas), reasonable courts could have differed over whether federal habeas petitioners merely had to show that they did not consent to the abandonment of their appeal rights following their guilty pleas. Reasonable courts could have adopted an alternate rule: in guilty plea cases, where there was not even a duty to advise defendants of their appeal rights, a federal habeas petitioner would have to show that he/she requested his/her attorney to file a notice of appeal and the attorney failed to do so. Indeed, other circuit courts have stated that the defendant must ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos v. United States*, 26 F.3d at 719 ("'Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue.") (decided shortly after petitioner's case became final); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). Although their holdings were not so limited, *Castellanos* and *Peak* involved a defendant who pleaded guilty. *Castellanos v. United States*, 26 F.3d at 718; *United States v. Peak*, 992 F.2d at 40. As noted, a rule is not dictated by precedent where reasonable courts differ about its application. *Greenawalt v. Ricketts*, 943 F.2d at 1024-1025. In the case at bar, reasonable courts could have differed about whether federal habeas petitioners merely had to show that they did not consent to abandonment of their appeals.[15]

The third step in *Teague* analysis is to determine whether either of two exceptions apply. *Caspari v. Bohlen*, 510 U. S. 383, 390. The first is seldom applicable and is limited to rules which place conduct beyond the reach of the criminal law. *Teague v. Lane*, 489 U.S. 288, 307. This is clearly inapplicable in the present case as *Stearns* does not "decriminalize" any conduct. The second exception involves new "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 396. It is not enough that accuracy or fairness be improved (*Sawyer v.Smith*, 497 U.S. 227, 242 (1990)), but it must be so fundamentally important that its announcement is a "groundbreaking occurrence." *Caspari v. Bohlen*, 510 U.S. 383, 396. It must be a "watershed rule" that "alter[s] our understanding of the bedrock procedural

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15. [Footnote 1 of Warden's Post-Hearing Brief.] *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993), and *Lozada v. Deeds*, 964 F.2d 956, 958, did not dictate the result in *Stearns*. These cases do not address the issue of whether a petitioner is entitled to relief when he/she entered a guilty plea. Indeed, the defendant in *Horodner* had a court trial (993 F.2d at 195) and the defendant in *Lozada* had a jury trial. *Lozada v. State*, 110 Nev. 349 [871 P.2d 944, 945] (1994). Moreover, the Ninth Circuit could have chosen to reverse its prior holdings in *Lozada* and *Horodner* in light of intervening opinion in *Castellanos*.

elements essential to the fairness of the proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242. The prototype is *Gideon v. Wainwright*, 12 372 U.S. 335 (1963). *Spaziano v. Singletary*, 36 F.3d 1028, 1043 (11th Cir. 1994). The Supreme Court in *Teague* recited that "we believe it unlikely that many such components of basic due process have yet to emerge." *Teague v. Lane*, 489 U.S. 288, 313. Clearly, the rule articulated in *Stearns* does not rise to the level of a "watershed rule." Thus, petitioner is not entitled to relief under *Stearns* as it is a "new rule" within the meaning of *Teague*.

MOREOVER, STEARNS IS DISTINGUISHABLE FROM THE PRESENT CASE BECAUSE STEARNS INVOLVED A COMPLEX SENTENCING SCHEME GIVING RISE TO POSSIBLE APPELLATE ISSUES EVEN IN THE CONTEXT OF A GUILTY PLEA

Moreover, Stearns is distinguishable from the case at bar because in *Stearns* the court stated, "it might be more obvious to counsel that a defendant may well wish to appeal after a trial, but given the inspissate brumes [dense fog] generated by the guidelines, counsel can hardly assume that a defendant who has pled guilty does not wish to appeal his sentence." *United States v. Stearns*, 68 F.3d at 110. Thus, in *Stearns* there was a complex sentencing scheme which precluded trial counsel from assuming that the defendant did not want to appeal his sentence, even though he had pleaded guilty. In the case at bar, there was no such complex sentencing scheme. Indeed, trial counsel testified that she would not have encouraged petitioner to appeal his sentence because an appeal would not have been successful. (RT 1/24/97, 41-44.) Petitioner's only basis for appealing his sentence would have been to claim

that the sentencing court abused its discretion in denying probation to a defendant who had pleaded guilty to murder. (RT 1/24/97, 44.) In trial counsel's opinion, such a claim would almost certainly fail. (RT 1/27/97, 44.) Thus, while *Stearns*' counsel was precluded from assuming that Stearns did not want to appeal, in the present case such as assumption was warranted.[16/]

Accordingly, for the above-stated reasons, petitioner's claim for relief must be denied.

Dated: March 12, 1997.

Respectfully submitted,

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16. [Footnote 2 of Warden's Post-Hearing Brief.] Respondent reiterates that there were also no meritorious grounds for attacking the validity of petitioner's plea. For example, petitioner understood that he faced a sentence of 15 years to life. Answer 11-12. This supports the reasonableness of trial counsel's assumption that petitioner did not want to appeal.

PRISONER'S POST-HEARING BRIEF
FILED MARCH 14, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES-ORTEGA,	NO. CV-F-95-5162 GEB HGB P
Petitioner,	POST-HEARING BRIEF
v.	Date: January 24, 1997
ERNEST C. ROE,	Judge: Hon. Hollis G. Best
Respondent.	

BACKGROUND

On October 13, 1993, Lucio Flores-Ortega entered a plea of guilty to the charge of second degree murder in the Superior Court of Fresno County before the Hon. Dwayne Keyes. He was represented by the Public Defender, Nancy Kops. The taking of the plea was excruciating, as evidenced by the transcript of the change of plea, attached hereto as Exhibit A. While back-pedaling on his plea of guilty, the defendant

asserted that, "seeing that I am alone, I am with the help of no one, it's better that I plead guilty." (COP 4)[17]

The interpreter, upon signing the plea form in open court indicated to the court that she did not editorialize, that she interpreted the Change of Plea form, and that she only interpreted what the attorney said and what the defendant said. (COP 14). The same interpreter testified at the evidentiary hearing. She remembered the case, and the defendant, because it was a difficult plea to get through. The plea was taken pursuant to *People v. West*, permitting Flores under California law to deny the crime to the court, while admitting that there is sufficient evidence to convict him.

Ms. Kops, the public defender, testified that she interviewed Mr. Flores on one occasion between the entry of the plea and the sentencing, and that was the day before the sentencing. She reviewed the sentencing report with Mr. Flores. (RT 37). Ms. Kops wrote on the bottom of the pre-sentence report, "Bring appeal papers." By that notation, she meant that she was planning to take appeal papers to court for Mr. Flores to sign. (RT 38). She believed that it was a possibility that she told him he could file an appeal. (RT 39). On cross-examination, she stated that she did not believe that she had promised Mr. Flores that she would file an appeal for him, because she believed that if she had promised it, she would have done it. (RT 40). She agreed that the notation "Bring appeal papers" indicated that there may have been a discussion regarding an appeal. (RT 50). She also agreed that she may have written the note and forgotten to bring the appeal

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17. [Footnote 1 of Prisoner's Post-Hearing Brief.] COP indicates the transcript of the Change of Plea, attached hereto as Exhibit A. RT indicates Reporter's Transcript of the proceedings on the evidentiary hearing herein.

papers. (RT 51). She agreed that she may have said to him, "If you're not happy with the sentence, we can file an appeal," but forgot to bring the appeal papers. (RT 52). The interpreter who went over the sentencing papers with Ms. Kops and Mr. Flores-Ortega was not the court interpreter. (RT 63).

Mr. Flores discovered, within approximately four months, that his attorney had not filed an appeal. On March 24, 1994, he submitted a Notice of Appeal and Request for Certificate of Probable Cause, attached hereto as Exhibit B. On April 8, 1994, the Clerk of the Court refused to file the Notice, and referred him to the Court of Appeal. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. In his affidavit in support of his petition herein, he stated, "My attorney, Nancy Kops, told me that I had the right to appeal the judgment like the court said. I did not understand what an appeal was, so she explained that I could have a higher court look at my case. She (my attorney) then told me that she would file the papers for that (a notice of appeal), and I thanked her for that." (Exhibit C).

This court held that petitioner had not sustained his burden to show a breach of promise to file a notice of appeal on the part of the attorney, but left open the issue of whether he had consented to a failure to file a Notice of Appeal under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995).

ARGUMENT

A. THIS COURT SHOULD PERMIT FILING OF THE NOTICE OF APPEAL; FAILURE TO FILE THE NOTICE OF APPEAL IN THIS CIRCUMSTANCE IS PER SE INEFFECTIVE ASSISTANCE OF COUNSEL

The order permitting evidentiary hearing in this matter permitted testimony solely on the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf. (ORDER).

In a petition under 28 U.S.C. §2254, it has been found to be a denial of effective counsel when an attorney fails to properly preserve his client's right to appeal. *Sanders v. Craven*, 488 F.2d 478, 479 (9th Cir. 1973). The petition in *Sanders* was similar, in that the attorney discussed the right of appeal with Sanders, but told him that it would cost too much, without advising him of his right to proceed in forma pauperis or that the notice of appeal must be filed within 10 days. Similarly, here, there was discussion of appeal between counsel and Flores-Ortega as indicated, objectively, by her notes, but a complete failure to complete the process of filing the Notice of Appeal.

Further, in *Sanders*, as in this case, there was some question about the phraseology used. The state argued that, "Sanders did not show that his counsel was aware of his desire to appeal, that his counsel knew of his indigence or that he in fact was ignorant of his in forma pauperis rights or the procedure to appeal." *Sanders*, 488 F.2d at 480. The court is not to consider the merits of the appeal, as the state court did in denying petitioner's request to file the notice, only whether the actions of counsel denied him his appellate rights.

Failure to file a notice of appeal is an error so serious that counsel was not functioning as the 'counsel'

guaranteed by the Sixth Amendment and the deficient performance prejudiced the defense. *United States v. Stearns*, 68 F.3d 328, 329 (9th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Stearns follows a Ninth Circuit habeas case in which the court declared:

> We hold that prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent.

Lozada v. Deeds, 964 F.2d 956, 958-959 (9th Cir. 1992).

The question of whether the fact that this was a guilty plea rather than a trial was "a distinction without a difference." *Stearns*, 68 F.3d 330.

It is clear that in this habeas case, this court must find that counsel was ineffective for failure to file a notice of appeal. The court has had the opportunity to see Mr. Flores and realistically judge whether he would understand any intricacies of the law of appeal. Most likely, if appeal rights were discussed, Ms. Kops said she would prepare the papers. If the rights were not discussed, then the matter should be reversed. The record is clear that Flores-Ortega did not consent to the failure to file the notice of appeal. This court stated that it is clear that, "Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." (RT 75).

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CONCLUSION

Since Mr. Flores-Ortega did not consent to the failure of his counsel to file a notice of appeal, this court should grant the petition for writ of habeas corpus.

Dated: March 14, 1997

Respectfully submitted,

QUIN DENVIR
Federal Defender

_____

ANN H. VORIS
Assistant Federal Defender
Attorney for Defendant
LUCIO FLORES-ORTEGA

FINDINGS AND RECOMMENDATIONS RE: PETITION FOR WRIT OF HABEAS CORPUS FILED APRIL 3, 1 '7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, *Petitioner,*	) No. CV F-95-) 5612) GEB HGB P
v.	)
ERNEST C. ROE, *Respondent.*	) FINDINGS AND) RECOMMENDATIONS) RE: PETITION FOR) WRIT OF HABEAS) CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254.

BACKGROUND

Petitioner was charged by information in case number 490730-9 in the Superior Court of the State of California, County of Fresno, with murder, with a personal use of a deadly weapon enhancement, and two counts of assault with a deadly weapon. Pursuant to a plea bargain, petitioner pled guilty to second degree murder and on November 10, 1993, was sentenced to 15 years to life in state prison.

Petitioner did not file a timely notice of appeal. However, on March 24, 1994, petitioner attempted to file a notice of appeal but was advised by the Clerk of

the Fresno County Superior Court that his notice was not filed because it was untimely. Petitions for a writ of habeas corpus were filed with both the California Court of Appeal for the Fifth Appellate District and with the California Supreme Court alleging ineffective assistance of trial counsel due to counsel's failure to file a timely notice of appeal. Both petitions were denied, the latter on January 18, 1995.

The instant petition for a writ of habeas corpus was filed in this court on July 27, 1995, and respondent's answer, filed on November 17, 1995, concedes petitioner has exhausted his state court remedies.

DISCUSSION

On October 13, 1993, the date set for his jury trial to commence, petitioner appeared in Superior Court with his court appointed public defender, Ms. Nancy Kops, and a state certified Spanish interpreter and entered a plea of guilty to second degree murder. The plea was entered pursuant to a plea bargain and *People v. West*, 3 Cal.3d 595 (1970), permitting petitioner under California law to deny commission of the crime while admitting there was sufficient evidence to convict him. In accord with the bargain, the prosecutor moved to strike the personal use of a deadly weapon enhancement allegation and to dismiss two additional felony charges of assault with a deadly weapon.

In the instant petition, petitioner alleges that Ms. Kops was constitutionally ineffective in failing to file a notice of appeal on his behalf after promising to do so.

This court ordered an evidentiary hearing to be held on the limited issue of the credibility of petitioner's assertions that Ms. Kops promised to file a notice of appeal on his behalf. The court appointed the Office of the Federal Defender to represent petitioner in connection with the evidentiary hearing.

The evidentiary hearing was held on January 24, 1997. Petitioner was represented by Assistant Federal Defender Ann H. Voris and respondent was represented by Paul E. O'Connor, Deputy Attorney General of the State of California. Testimony was received from petitioner, from Ms. Kops, and from Cheryl Sauceda, the certified court interpreter at both the change of plea hearing on October 13, 1993, and the sentencing hearing on November 10, 1993.

At the conclusion of the evidentiary hearing, this court noted on the record, "It is clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game."

This court made a factual finding that petitioner had not met his burden of proving by a preponderance of the evidence that Ms. Kops had promised to file a notice of appeal on his behalf. (Evidentiary hearing transcript, p. 75-76.)

This court further found that petitioner did not consent to Ms. Kops' failure to file a notice of appeal. (Evidentiary hearing transcript, p. 74.)

Counsel were asked to file post-hearing briefs addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), in light of the above factual findings. Post-hearing briefs on behalf of both parties were filed on March 14, 1997. Although the parties were granted until March 21, 1997, to file a response to the other party's post-hearing brief, no such responses were filed.

In *Stearns*, *supra*, Stearns pleaded guilty to bank robbery in the federal district court and was sentenced. He did not file an appeal, but two years later filed a habeas petition alleging that his attorney failed to file an appeal, as requested. Relying upon its earlier decisions in *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993) and *Lozada v. Deeds*, 964 F.2d 956 (9th Cir.

1992), a state conviction, the Ninth Circuit reversed the district court's denial of the petition holding that "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal. Of course, Stearns says that he did make a request, but he need only show that he did not consent to the failure to file." *United States v. Stearns*, *supra*, 68 F.3d at 330. The court further held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984) if it is established that counsel's failure to file a notice of appeal was without the Stearns' consent. *United States v. Stearns*, *supra*, 68 F.3d at 329.

The *Stearns* court also noted that cases from two other circuits had held that an attorney's failure to appeal after a guilty plea results in ineffective assistance of counsel without a specific showing of prejudice, citing to *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) and *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993). Regarding these cases, the *Stearns* court stated:

> The law applied in those cases was slightly different from the law of this circuit because in those cases the petitioner had requested that an appeal be filed, and counsel had not followed the request. *Castellanos*, at least, put much weight on the need for that request. 26 F.3d at 719. In doing so it relied on cases where a request was made after a trial, and stated that a "'[r]equest' is an important ingredient in this formula."

United States v. Stearns, *supra*, 68 F.3d at 330.

Noting that both *United States v. Horodner*, *supra*, and *Lozada v. Deeds*, *supra*, involved habeas petitions filed after convictions following trial, respondent argues

that petitioner is not entitled to relief under *Stearns* because that case states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) and has no retroactive application. *Teague* held that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement. *Id*. at p. 310. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id*. at p. 301; *see also Penry v. Lynaugh*, 492 U.S. 302, 313, (1989).

The Supreme Court recently spelled out how *Teague* must be applied where the State argues that a petitioner seeks the benefit of a new rule of constitutional law:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of the new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bohlen, 510 U.S. 383, 389-390 (1994) (internal citations omitted).

In our present case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. California Rules of Court, rule 31(a). No notice of appeal was filed within that time and petitioner's conviction therefore became final on January 9, 1994.

The Ninth Circuits decision in *Teague* was filed on October 12, 1995.

Surveying the legal landscape of California as of January 9, 1994, a sentencing court was not required to advise a defendant of his appeal rights following a guilty plea. Cal. Rules of Court, rule 470. However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Pen. Code, § 1240.1, subd. (a). Subdivision (b) of section 1240.1 provided in pertinent part:

> (b) It shall be the duty of every attorney representing an indigent defendant in any criminal . . . case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

In the present case, Ms. Kops was appointed to represent petitioner, an indigent, who entered a guilty

plea to second degree murder. Ms Kops testified that in her opinion the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation and an appeal on that ground "would almost certainly fail." (Evidentiary hearing transcript, p. 43-44.) Ms. Kops also testified that while she would not have encouraged petitioner to file an appeal, had he asked her to do so she would "still go ahead and file it." (Evidentiary hearing transcript, p. 49.)

It would appear, therefore, that Ms. Kops would have been under no statutory duty to file an appeal on behalf of petitioner under California law. No California or federal case law has been found holding, prior to the decision in *United States v. Stearns*, *supra*, 68 F.3d 328, that an attorney, either retained or appointed, had a duty to file a notice of appeal for a defendant following a guilty or no contest plea, absent a specific request by the defendant. In fact, federal cases specifically stated that an attorney had no duty to advise his or her client of the right to appeal following a guilty plea and, in the absence of a request, failure to file a timely notice of appeal after a guilty plea did not constitute ineffective assistance of counsel. *See, e.g.*, *United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (and cases cited); *see also Belford v. United States*, 975 F.2d 310, 314 (7th Cir. 1992) (and cases cited); *Castellanos v. United States*, *supra*, 26 F.3d 717, 719; *Carey v. Leverette*, 605 F.2d 745, 746 (4th Cir. 1979) (despite a earlier contrary holding by the same circuit in *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969).

It seems clear under the "legal landscape as it then existed," no California court "would have felt compelled by existing precedent" to hold that in the absence of petitioner's consent, Ms. Kops' failure to file a timely notice of appeal constituted a denial of effective

assistance of counsel. *See Caspari v. Bohlen*, *supra*, 510 U.S. at 390.

Turning to the third step of the analysis, it also seems clear that the "new rule" does not fall within either of the two narrow exceptions to the nonretroactivity principle. *Teague* held that a new rule may still be applied retroactively if it fits into one of two narrow exceptions. First, a new rule should be applied retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted). Or, as the Supreme Court further explained in *Sawyer v. Smith*, 497 U.S. 227 at page 241, the first exception "applies to new rules that place an entire category of primary conduct beyond the reach of a the criminal law . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, . . . The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." (citations omitted.)

Clearly, the new rule announced in *Stearns* would not fall within the first *Teague* exception.

As to the second exception, the *Sawyer* court further explained, "It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also, '"alter our understanding of the bedrock procedural elements"' essential to the fairness of the proceeding." *Sawyer v. Smith*, *supra*, 497 U.S. at 242. And, "As we stated in *Teague*, because the second exception is directed only at new rules essential to the

accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" 467 U.S. at 243.

The *Stearns* rule, that a defendant who does not consent to his attorney's failure to file a timely notice of appeal will be deemed to have received prejudicial ineffective assistance of counsel, would appear to have nothing to do with the accuracy of the trial nor would it alter the underlying procedural elements essential to the fairness of the proceeding. At most, retroactive application of the *Stearns* rule to this case would allow petitioner to file a belated appeal in the state courts if the trial court would issue a certificate of probable cause for such an appeal pursuant to California Penal Code, section 1237.2.[18]

---

18. [Footnote 1 of Findings and Recommendations Re: Petition for Writ of Habeas Corpus]

California Penal Code, section 1237.2 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following admission of violation, except where both the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the assigned District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Oilseed*, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 3, 1997

HOLLIS G. BEST
UNITED STATES MAGISTRATE JUDGE

ORDER RE: FINDINGS AND RECOMMENDATION AND OBJECTIONS FILED JUNE 30, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA, Petitioner,	CIV F-95-5612 GEB HGB P
v.	ORDER RE: FINDINGS & RECOMMENDATION
ERNEST C. ROE, Respondent.	(#27) AND OBJECTIONS (#28)

Petitioner, a state prisoner proceeding in forma pauperis with appointed counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On April 3, 1997, the magistrate judge filed findings and recommendation herein which were served on both parties and which contained notice to both parties that any objections to the findings and recommendation were to be filed within thirty (30) days. On May 2, 1997, petitioner filed timely objections to the findings and recommendation.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, the court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendation to be supported by the record and by proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendation filed April 3, 1997, is adopted in full; and

2. Petitioner's application for writ of habeas corpus is denied.

DATED: June 30, 1997

GARLAND E. BURRELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
OPINION
FILED NOVEMBER 2, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lucio Flores Ortega, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
Ernest C. Roe, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding
Submitted Oct. 5, 1998*
San Francisco, California
Filed November 2, 1998

Before: Robert R. Beezer, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Beezer.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

COUNSEL

Ann H. Voris, Assistant Federal Defender, Fresno, California, for the petitioner-appellant.
Paul E. O'Connor, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

BEEZER, Circuit Judge:

Lucio Flores Ortega appeals the denial of his petition for habeas corpus. We address the question whether our opinion in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), expressed a new rule barred from application in the present matter by *Teague v. Lane*, 489 U.S. 288 (1989). We hold that *Stearns* did not express a new rule, rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992). We have jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I
A

Petitioner pled guilty to second degree murder in a California Superior Court on October 13, 1993. At the plea hearing, petitioner was represented by a public defender. During the hearing the public defender wrote in her file "bring appeal papers." On March 24, 1994 petitioner attempted to file a notice of appeal which was rejected as untimely.

Petitioner filed a state court petition for a writ of habeas corpus on the ground that trial counsel was ineffective for failing to file a timely notice of appeal. Petitioner subsequently exhausted his state court remedies.

On July 27, 1995, petitioner filed a federal petition for habeas corpus. Respondent answered on November 17, 1995. The matter was referred to a magistrate judge, who held an evidentiary hearing on the limited issue of the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf.

After the hearing, the magistrate judge made the following findings: Petitioner "had little or no understanding" of what an appeal meant or the appeals process. Petitioner had not proved that his counsel had promised to file a notice of appeal. Petitioner did not consent to counsel's failure to file a notice of appeal. The magistrate judge considered whether our opinion in *Stearns* applied to petitioner's claims but ultimately concluded that petitioner was not entitled to relief under *Stearns* on the theory that *Stearns* stated a "new rule" which could not be applied retroactively under *Teague v. Lane*.

The district court adopted the magistrate judge's recommendation that the petition be denied. The court subsequently granted petitioner a certificate of probable cause and this timely appeal followed.

B

We review de novo the denial of a § 2255 motion. *Stearns*, 68 F.3d at 329. The district court's factual findings are reviewed for clear error. *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1072 (9th Cir. 1998).

To establish ineffective assistance of counsel, a petitioner must prove that: (1) counsel's performance was ineffective and (2) the ineffective performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Stearns*, we held that failure to appeal after a plea agreement is ineffective assistance of counsel without a specific showing of prejudice. *Stearns*, 68 F.3d at 329-30. A petitioner "need only show that he did not consent to the failure to file." *Id.* at 330. The magistrate judge found that petitioner did not consent to the failure to file a notice of appeal. This finding, reviewed for clear error, resolves the application of *Stearns* in petitioner's favor.

II

Resolution of the present matter hinges on whether we expressed in *Stearns* a "new rule" as defined by *Teague*. *Teague* requires a three-step analysis. First, the court must determine the date on which the petitioner's conviction became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Second, it must "[s]urvey[ ] the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, "if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity." *Lambrix v. Singletary*, 520 U.S. 518, ___, 117 S.Ct. 1517, 1524-25 (1997).

Those exceptions apply where either (1) "the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the Constitution;" or (2) the rule announces a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 477-78 (internal quotations omitted). Watershed rules are those which are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. The exception is "meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478 (internal quotations omitted).

Steps one and three of the *Teague* analysis are clearly resolved in respondent's favor. *Stearns* postdates

petitioner's case. Petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. *Stearns* was filed on October 12, 1995. Additionally, *Stearns* does not fit under the narrow exceptions to *Teague* reserved for rules that go to the fundamental fairness of the adjudicative process.

The second element of the *Teague* analysis, however, requires reversal. A "new rule," as contemplated by *Teague*, is one which "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or 'was not dictated by precedent existing at the time the defendant's conviction became final.'" *Snook v. Wood*, 89 F.3d 605, 612 (9th Cir. 1996) (quoting *Teague*, 489 U.S. at 301).

Stearns tracks our opinion in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), which predates petitioner's conviction. In *Lozada*, we held that "'prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was *without the petitioner's consent*.'" *Stearns*, 68 F.3d at 329 (quoting *Lozada*, 964 F.2d at 958) (emphasis in original). In *Stearns*, we reasoned that *Lozada* "would automatically demand reversal in this case, but for one distinction[:] The judgement in this case was entered after a plea rather than after a trial." *Id.* at 330. We conclude that *Stearns* was merely an application of the rule in *Lozada*. Petitioner does not rely on a new rule and his petition is not barred by *Teague*.

III

The district court is instructed to issue a conditional writ releasing Ortega from state custody unless the state trial court vacates and reenters petitioner's judgment of conviction and allows a fresh appeal. We REVERSE and REMAND.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
JUDGMENT -
FILED NOVEMBER 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-17232
CT/AG#: CV-95-05612-GEB

LUCIO FLORES ORTEGA
Petitioner - Appellant

v.

ERNEST C. ROE, Warden
Respondent - Appellee

APPEAL FROM the United States District Court for the Eastern District of California (Fresno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Fresno) and was dully submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED

Filed and entered November 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
ORDER DENYING REHEARING AND REJECTING
SUGGESTION FOR REHEARING EN BANC
FILED DECEMBER 11, 1998

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO FLORES ORTEGA, *Petitioner-Appellant,*	)	No. 97-17232
v.	)	D.C. No.
ERNEST C. ROE, Warden, *Respondent-Appellee.*	)	CV-95-05612 GEB
	)	ORDER

Before: BEEZER, HALL and RYMER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES SUPREME COURT
ORDER GRANTING CERTIORARI
MAY 3, 1999

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 3, 1999

Mr. Paul Edward O'Connor
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Ernest C. Roe, Warden
v. Lucio Flores Ortega
No. 98-1441

Dear Mr. O'Connor:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

Sincerely,

William K. Suter, Clerk

No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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Attorney General
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DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
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Counsel for Petitioner

QUESTION PRESENTED

Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1441

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

OPINION OR JUDGMENT BELOW[1/]

The decisions previously filed in this case are reproduced in the joint appendix ("J.A.") filed under separate cover. The opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") appears at J.A. 164-168 and is reported at 160 F.3d 534 (CA9 1998) (case number 97-17232). The unreported order of the United States District Court for the Eastern District of California appears at J.A. 162-163 (case number CV-F-95-5612 GEB HGB P). The unreported Findings and Recommendations of the United States Magistrate Judge appear at J.A. 152-161 (case number CV-F-95-5612 GEB HGB P). The California Supreme Court's unreported order denying habeas relief appears at J.A. 45 (case number S042190). The California Court of Appeal's unreported opinion denying habeas corpus relief appears at J.A. 42-44 (case number F021708).

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1. This section contains the citations required by Rule 24(d) of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

On November 2, 1998, the Ninth Circuit issued a published opinion in this case. On December 11, 1998, the Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc. On March 4, 1999, the Warden filed his petition for writ of certiorari, within ninety (90) days of the denial order. On May 3, 1999, this Court granted the Warden's petition, limited to the question presented above. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix A. These authorities include: the Sixth Amendment to the United States Constitution; California Penal Code § 1237.5; California Penal Code § 1240.1; California Rules of Court, Rule 31(d); California Rules of Court, Rule 470; and Federal Rules of Criminal Procedure, Rule 32.

STATEMENT OF THE CASE

An information was filed in the Superior Court of California, in and for the County of Fresno ("superior court"), in case number 490730-9, charging Respondent Lucio Flores Ortega ("the Prisoner") as follows: in count one, with violating California Penal Code § 187 (murder);[2] and in counts two and three with violating § 245 (assault with a deadly weapon). As to count one, the information also alleged a violation of § 12022(b) (an

2. All further statutory references are to the California Penal Code unless otherwise indicated. This is not a capital case.

enhancement for the personal use of a deadly weapon). (J.A. 24, 27-29 [Plea Tr. at 12, 15-17].)

On October 13, 1993, the Prisoner pled guilty to the murder count. (J.A. 26-27 [Plea Tr. at 14].) On November 10, 1993, the superior court granted the prosecution's motion to dismiss counts two and three (assault with a deadly weapon) and to strike the § 12022(b) allegation of personal use of a deadly weapon. (J.A. 39 [Sentencing Tr. at 9].)

On the same date, the superior court sentenced the Prisoner to fifteen years to life in state prison, with 267 days of custody credit. (J.A. 40 [Sentencing Tr. at 10].) The superior court advised the Prisoner of his appeal rights and the applicable time limits. (J.A. 40 [Sentencing Tr. at 10-11].) The Prisoner was also advised of his right to appointed counsel on appeal. (J.A. 40 [Sentencing Tr. at 11].) The court stated:

> You may file an appeal 60 days from today's date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal.

(J.A. 40 [Sentencing Tr. at 10-11].)

Nevertheless, the Prisoner did not file a timely notice of appeal.

On or about March 17, 1994, or March 24, 1994, the Prisoner attempted to file a late notice of appeal. (Excerpts of Record filed in the Ninth Circuit on February 20, 1998 ["ER"] 47-55; CR 8 [lodged state record; Notice of Appeal dated March 24, 1994].)[3] The clerk of the

3. "CR" refers to the Clerk's Record (i.e., the docket sheet prepared by the Clerk of the United States District Court for the Eastern District of California).

superior court informed the Prisoner that his notice was not filed because it was untimely. (ER 57; CR 8 [lodged state record; letter of April 8, 1994, from Clerk of Fresno County Superior Court].) Thereafter, the California Court of Appeal, Fifth Appellate District, denied the Prisoner's petition for writ of habeas corpus which included a motion for leave to file a belated notice of appeal. (J.A. 42-44 [opinion denying relief]; CR 8 [lodged state record; petition for writ of habeas corpus filed in the California Court of Appeal, Fifth Appellate District, case number F021708].) The California Supreme Court denied a habeas corpus petition filed therein, which requested the same relief. (J.A. 45 [denial order]; ER 68-76 [California Supreme Court petition]; CR 8 [lodged state record; habeas corpus petition filed in California Supreme Court, case number S042190].)

On July 27, 1995, pursuant to 28 U.S.C. § 2254, the Prisoner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, and the Warden answered. (J.A. 46-75 [Petition]; J.A. 78-91 [Answer].)

In his federal habeas petition, the Prisoner claimed that his state trial counsel (Ms. Nancy Kops) promised to file a notice of appeal on his behalf and failed to do so. (J.A. 51, 59, 62-63, 66, 74-75.) Following appointment of the Federal Defender as Prisoner's counsel, an evidentiary hearing was held on January 24, 1997, to address the sole issue of the credibility of this assertion. (J.A. 92-93 [order of appointment]; J.A. 106-138 [excerpts from Evidentiary Hearing Transcript ["Evid. Hrg. Tr."]]; Supplemental Excerpts of Record filed in the

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Pursuant to Rule 26.2 of the Rules of the Supreme Court of the United States, the Warden will refer to relevant portions of the record not included in the joint appendix. Most such portions of the record are comparatively unimportant. Most relevant portions of the record are included in the joint appendix.

Ninth Circuit on March 25, 1998 ["SER"] [complete Evid. Hrg. Tr.]; CR 23 [same].) The Prisoner, trial counsel, and a court interpreter testified at the hearing. (J.A. 106-126 [Evid. Hrg. Tr. at 33-57] [counsel's testimony]; SER 2-68 [complete testimony].)

At the conclusion of the evidentiary hearing, the Magistrate Judge made a number of findings from the bench. The Magistrate Judge read a passage from *United States v. Stearns*, 68 F.3d 328, 330 (CA9 1995), which requires that a federal defendant consent to the failure to file a notice of appeal, even after a guilty plea. (J.A. 132 [Evid. Hrg. Tr. at 74].) The Magistrate Judge stated that the evidence was "quite clear" that the Prisoner did not consent to the failure to file a notice of appeal. (J.A. 132 [Evid. Hrg. Tr. at 74].) The Magistrate Judge also said that it was "clear" that the Prisoner had "little or no understanding" of the appeal process, or "what appeal meant at that stage of the game." (J.A. 133 [Evid. Hrg. Tr. at 75].) The Magistrate Judge expressed his belief that there was a conversation after sentencing between counsel and the Prisoner from which the Prisoner inferred that counsel would file a notice of appeal. (J.A. 133 [Evid. Hrg. Tr. at 76].)

The Magistrate Judge noted that trial counsel had no recollection of this. (J.A. 133 [Evid. Hrg. Tr. at 76].) The Magistrate Judge also stated that counsel was very experienced and obviously very meticulous. (J.A. 133 [Evid. Hrg. Tr. at 76].) The Magistrate Judge said that had the Prisoner requested that counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Finally, the Magistrate Judge found that the Prisoner had not met his burden of showing by a preponderance of the evidence that counsel had promised to file a notice of appeal. (J.A. 133 [Evid. Hrg. Tr. at 76].)

The parties briefed the issue of whether the Prisoner was entitled to relief under *Stearns* in light of the

Magistrate Judge's findings. (J.A. 139-151 [post-hearing briefs].)

On April 3, 1997, the Magistrate Judge filed his Findings and Recommendations ("F. & R."), recommending denial of the petition. (J.A. 152-161.) The Findings and Recommendations recited the Magistrate Judge's statement that the Prisoner had little or no understanding of the appellate process or what an appeal meant. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations also noted the finding that the Prisoner had not met his burden of proving by a preponderance of the evidence that counsel had promised to file a notice of appeal. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations also reported the finding that the Prisoner did not consent to counsel's "failure" to file a notice of appeal. (J.A. 154 [F. & R. at 3].) The Findings and Recommendations nevertheless concluded that the Prisoner was not entitled to relief under *Stearns*, 68 F.3d 328, because *Stearns* was a "new rule" barred by *Teague v. Lane*, 489 U.S. 288 (1989). (J.A. 155-160 [F. & R. at 5-9].) The Prisoner filed objections and the Warden replied. (CR 28 [Objections]; CR 29 [Reply].) The District Court adopted the Findings and Recommendations in full and denied the petition. (J.A. 162-163.) The Prisoner filed an appeal in the Ninth Circuit.

In a published opinion, *Ortega v. Roe*, 160 F.3d 534 (CA9 1998), filed November 2, 1998, the Ninth Circuit reversed and remanded. (J.A. 164-168.) The Ninth Circuit held that *Stearns* did not state a "new rule," rather it was an application of the rule in *Lozada v. Deeds*, 964 F.2d 956 (CA9 1992). (J.A. 168.) In *Lozada*, the Ninth Circuit held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668 (1984), if it is established that counsel's failure to file a notice of appeal was without the defendant's consent. *Lozada* involved a conviction after trial. *Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994). The Ninth Circuit's *Ortega* decision

instructed the District Court to issue a conditional writ releasing the Prisoner from state custody unless the state trial court vacated and reentered the Prisoner's judgment of conviction and allowed a fresh appeal. (J.A. 168.)[4] The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc.

On May 3, 1999, this Court granted the Warden's petition for certiorari on the question presented.

SUMMARY OF ARGUMENT

In general, trial counsel has no Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights.

This principle is supported by the widely recognized proposition that, in general, trial counsel has no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea. In turn, this proposition is supported by the equally well-established principle that a guilty plea waives numerous appellate issues. In a similar vein, it has been recognized that requiring a trial court to advise a defendant of his/her post-plea appeal rights would often be confusing, build false hopes, encourage frivolous appeals, and burden taxpayers. Further, the Warden's position is supported by the principle that, in general, by pleading guilty a defendant has manifested a desire to terminate the litigation.

Further, if the *Ortega* decision stands, every defendant in the Ninth Circuit who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, at least if his/her

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4. In at least one other case, the Ninth Circuit has granted relief based on *Stearns* and *Ortega*. *Salmon v. Carrillo*, No. 96-55707 (9th Cir. Nov. 13, 1998) [1998 WL 792290] (unpublished disposition).

case became final after *Lozada* was decided. This would subject even final judgments to challenge via state or federal habeas corpus petitions based on claimed lack-of-consent even though California law has never required an attorney to obtain consent before abandoning an appeal following a guilty plea. Most of the resulting requests for certificates of probable cause (generally required for post-plea appeals in California) and subsequent appeals will be meritless as they will have arisen out of guilty pleas.

The Warden's position is also supported by this Court's recent statement that the rule of presumed prejudice articulated in *Rodriquez v. United States*, 395 U.S. 327 (1969), is not implicated where there is no request for an appeal. *Peguero v. United States*, ___ U.S. ___, ___, 119 S.Ct. 961, 965, 143 L.Ed.2d 18, ___, 67 USLW 4154, ____ (1999).[5]

In sum, it is clear that, in general, trial counsel has no Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights. This Court should disapprove of *Ortega v. Roe*, 160 F.3d 534, and *United States v. Stearns*, 68 F.3d 328, to the extent they are inconsistent with this principle. This Court should also hold that the Prisoner is not entitled to relief and should reverse the judgment of the Ninth Circuit.

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5. *Strickland v. Washington*, 466 U.S. at 692, states that, "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."

Evitts v. Lucey, 469 U.S. 387, 396 (1985), states that a first appeal of right is not adjudicated in accord with due process if the appellant does not have the effective assistance of an attorney.

ARGUMENT

I.

IN GENERAL, TRIAL COUNSEL HAS NO SIXTH AMENDMENT DUTY TO FILE A NOTICE OF APPEAL FOLLOWING A GUILTY PLEA IN THE ABSENCE OF A REQUEST BY THE DEFENDANT, PARTICULARLY WHERE THE DEFENDANT HAS BEEN ADVISED OF HIS APPEAL RIGHTS

In general, trial counsel has no Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of such a request by the defendant, particularly where the defendant has been advised of his appeal rights.

For the reasons discussed below, requiring a request for appeal is particularly appropriate in a guilty plea case, especially where the defendant has been advised of his appeal rights.[6]

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6. As used in this brief, a "guilty plea" shall also include a plea of no contest.

The Warden does not waive any argument pursuant to *Teague v. Lane*, 489 U.S. 288.

A request for appeal is also required after a trial. *See, e.g., United States v. Davis*, 929 F.2d 554, 556-57 (CA10 1991). However, this requirement applies with particular force after a guilty plea.

A. Requiring A Request For Appeal Is Particularly Compelling In A Guilty Plea Case

Requiring a request for appeal makes particular sense in the context of a guilty plea. To begin with, a guilty plea waives numerous appellate issues. This Court has recognized this principle:

> . . . a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)].

Tollett v. Henderson, 411 U.S. 258, 267 (1973), bracketed citation added.[7]

There are significant differences between post-trial appeals and post-plea appeals. One court has discussed these differences in the context of applying a

7. The Prisoner may assert that he entered his guilty plea without actually admitting his guilt. (J.A. 27 [Plea Tr. at 14-15].) However, this is a distinction which makes no difference. Cf. § 1016 (legal effect of no contest plea to crime punishable as felony shall be same as that of a guilty plea for all purposes); *see also People v. Bradford*, 15 Cal.4th 1229, 1374-75, 939 P.2d 259, 346, 65 Cal.Rptr.2d 145, 232 (Cal. 1997).

presumption of ineffective assistance of counsel. The court stated:

> Criminal defendants convicted at trial generally file a notice of appeal. As a result, (1) the absence of a notice of appeal and an affidavit of waiver strongly suggests the failure of trial counsel to consult adequately with the client concerning the right to appeal; and (2) creating a conclusive presumption [of ineffective assistance] in that circumstance would not significantly increase the burden on this court. Moreover, the presumption would be in the interest of finality. In the absence of the presumption, the question of ineffectiveness of counsel could be litigated for years in habeas corpus proceedings, with the likely result that an untimely appeal ultimately would be permitted.

State v. Peppers, 110 N.M. 393, 398; 796 P.2d 614, 619 (N.M. Ct.App. 1990), bracketed phrase added.

The *Peppers* court then contrasted post-trial appeals with post-plea appeals:

> In contrast, after a plea of guilty or no contest, appeals are uncommon. After all, only a limited number of issues can be raised on appeal from a conviction based on a plea. Failure to appeal does not imply lack of diligence by counsel. We have never suggested that counsel should obtain affidavits of waiver of appeal when appeals are not pursued after a plea of guilty or no contest. In addition, creation of a conclusive presumption of ineffective assistance of counsel when such a plea has not been appealed would provide defendants with an automatic right to an

> untimely appeal from the plea. Appellate courts would likely be burdened with numerous additional appeals reopening old cases. The interest in finality would be thwarted, not advanced.

State v. Peppers, 110 N.M. at 398-99; 796 P.2d at 619-20.[8] Thus, there are significant differences between post-trial appeals and post-plea appeals. (E.g., waiver of appellate issues after plea.) These differences weigh against a presumption of ineffective assistance where no appeal is filed following a plea. *Stearns* has effectively created a such a presumption in post-plea cases. Indeed, under *Stearns* this presumption is conclusive where an attorney does not file an appeal or obtain a waiver of appeal rights. Because the *Stearns* presumption overlooks critical distinctions between post-trial appeals and post-plea appeals, it should be rejected.

It is widely recognized that a guilty plea waives appellate issues. In California, a guilty plea admits all matters essential to the conviction. *People v. DeVaughn*, 18 Cal.3d 889, 895-96, 558 P.2d 872, 875, 135 Cal.Rptr. 786, 789 (Cal. 1977); *see also People v. Turner*, 171 Cal.App.3d 116, 125-26, 214 Cal.Rptr. 572, 577 (Cal.Ct.App. 1985) (guilty plea waives right to raise questions regarding evidence). Indeed, California generally requires a certificate of probable cause for an appeal from a judgment following a guilty plea. § 1237.5; Cal. Rules of Court, Rule 31(d). Federal cases have also recognized that a guilty plea limits the issues that can be raised on appeal. *See, e.g., United States v. Cordero*, 42 F.3d 697, 698 (CA1 1994); *Laycock v. New Mexico*, 880 F.2d 1184, 1187-88 (CA10 1989); *Marrow v. United States*,

8. Notwithstanding the language in *Peppers*, the Warden reiterates that a request for appeal is also required after a trial. *See, e.g., United States v. Davis*, 929 F.2d at 556-57.

772 F.2d 525, 529 (CA9 1985). States besides California have acknowledged this as well. *See, e.g., State v. Peppers*, 110 N.M. at 398-99, 796 P.2d at 619-20. Again, waiver of appellate issues weighs against a rule of ineffective assistance where there is no appeal or waiver of appeal after a guilty plea.

Marrow, 772 F.2d at 529, likewise noted that a defendant who pleads guilty waives numerous appellate issues. The court correctly pointed out that advising a defendant of his appeal rights after a guilty plea is frequently pointless and in such cases is not constitutionally required. As the court stated:

> More important, one who has voluntarily pleaded guilty after being fully advised of his rights pursuant to Rule 11 will normally have foreclosed his right to appeal. *See Tollett* [*v. Henderson*], 411 U.S. [258] at 266-67, 93 S.Ct. [1602] at 1607-08 [1973]. Informing a defendant who has pleaded guilty of the right to appeal would in a large number of cases serve no useful purpose. In those cases counsel need not advise the defendant of any right to appeal.

Marrow, 772 F.2d at 529, bracketed citation added.

Further, the Warden submits that, in general, when a defendant pleads guilty, he manifests a desire to terminate the litigation. This Court has observed that a defendant demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for a successful rehabilitation in a shorter period of time than might otherwise be necessary. *Brady v. United States*, 397 U.S. 742, 753 (1970). Thus, after a plea it is usually

reasonable to assume that further legal proceedings will be unnecessary.[9]

The Warden's position is supported by a number of federal circuit decisions which have indicated that a defendant must ask his attorney to file a notice of appeal before the attorney has an obligation to do so. *See, e.g.*, *Ludwig v. United States*, 162 F.3d 456, 459 (CA6 1998); *Morales v. United States*, 143 F.3d 94, 97 (CA2 1998); *Castellanos v. United States*, 26 F.3d 717, 719 (CA7 1994). The requirement of a request is usually contained in a discussion of whether a per se rule of prejudice applies where counsel has failed to initiate or prosecute an appeal. In contrast to these decisions, the Ninth Circuit's rule effectively requires an attorney to file a notice of appeal whenever the defendant does not consent to the abandonment of his appeal. *See, e.g.*, *Stearns*, 68 F.3d at 330. As noted, the Ninth Circuit's rule overlooks or dismisses critical distinctions between convictions following trial and convictions following guilty plea (e.g., waiver of appellate issues following a guilty plea). *See, e.g.*, *State v. Peppers*, 110 N.M. at 398-99, 796 P.2d at 619-20.[10] The Warden submits that, in general, a request for appeal is required before counsel has a Sixth Amendment obligation to file a notice of appeal, at least following a guilty plea, particularly where the defendant has been advised of his appeal rights.

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9. This Court has also noted that there is a "fundamental interest" in the finality of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

10. In *Ortega*, 160 F.3d at 536, the Ninth Circuit stated that *Stearns* tracked *Lozada*, 964 F.2d 956. The Warden submits that *Lozada* is distinguishable from *Stearns* and the present case. *Lozada* was not a guilty plea case. *Lozada v. State*, 110 Nev. at 350, 871 P.2d at 945. The Warden has already discussed the distinctions between guilty plea cases and trial cases.

B. <u>Requiring A Request For Appeal Is Particularly Compelling Where The Defendant Has Been Advised Of His Appeal Rights</u>

The requirement of a request is also particularly compelling where the defendant has been advised of his appeal rights, as in this case. As noted in *Castellanos*, the constitution does not require a lawyer to advise his client of the right to appeal. *Castellanos*, 26 F.3d at 719.[11] The duty to advise rests principally with the trial judge. *Castellanos*, 26 F.3d at 719. Further, even if both judge and counsel forget to provide such advice, most defendants know about the possibility of appeal and cannot complain if they are not provided with redundant information. *Id.* While this is undoubtedly true, the requirement of a request is more compelling where the defendant is advised of his appeal rights.

In the present case, the Prisoner pled guilty and the trial court advised the Prisoner of his appeal rights. (J.A. 40 [Sentencing Tr. at 10-11].) The District Court and Magistrate Judge properly found that there was no request for an appeal. (J.A. 157-159 [F. & R. at 6-7]; J.A. 133 [Evid. Hrg. Tr. at 76].) The Findings and Recommendations noted that under § 1240.1(b), an attorney has a duty to file a notice of appeal when "directed to do so by a defendant having a right to appeal." (J.A. 157 [F. & R. at 6].) The Findings and Recommendations also cited trial counsel's evidentiary hearing testimony that if a client asked her to file a notice of appeal, she would do so. (J.A. 158 [F. & R. at 7]; J.A. 119-120 [Evid. Hrg. Tr. at 49-50].) The Findings and Recommendations state, "It would appear, therefore, that Ms. Kops [trial counsel] would have been under no statutory duty to file an appeal on behalf of petitioner [the

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11. At least this is generally true following a guilty plea. *See, e.g.*, *Marrow*, 772 F.2d at 528.

Prisoner] under California law." (J.A. 158 [F. & R. at 7].) This constitutes a finding that the Prisoner did not request trial counsel to file a notice of appeal. As noted, the Magistrate Judge found that had the Prisoner requested that counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, it would be appropriate to hold that, in the present case, counsel had no Sixth Amendment duty to file a notice of appeal.

II.

THE REQUIREMENT OF A REQUEST FOR APPEAL IS SUPPORTED BY THE PRINCIPLE THAT, IN GENERAL, TRIAL COUNSEL HAS NO ABSOLUTE SIXTH AMENDMENT DUTY TO ADVISE A DEFENDANT OF HIS APPEAL RIGHTS AFTER A GUILTY PLEA

The requirement of a request for appeal is also supported by the principle that, in general, trial counsel has no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea. If counsel has no absolute constitutional duty to advise a defendant of his post-plea appeal rights, it is difficult to understand how counsel can have an absolute constitutional duty to obtain a waiver of such rights.

Marrow, 772 F.2d at 528, articulates the principle that counsel has no duty, in all cases, to advise his client of post-plea appellate remedies:

> We conclude that there is no duty in all cases to advise of the right to appeal a conviction after a guilty plea. Rather, counsel is obligated to give such advice only when the defendant inquires about appeal rights or when there are circumstances present that indicate that defendant may benefit from receiving such advice.

The *Marrow* court found support for its conclusion in the legislative history of the Federal Rules of Criminal Procedure, Rule 32. The *Marrow* court looked first to an older version of Rule 32 which did not

require any advisement of appeal rights after a guilty plea. *Id.*

The *Marrow* court cited the advisory committee notes to the Rules to explain the rationale for the rule:

> To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. *See* American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advise to "contested cases."
>
> The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Marrow, 772 F.2d at 528, quoting notes of the Advisory Committee on Rules.

The *Marrow* court noted that Rule 32 has since been amended to require the trial court to advise a defendant of any right to appeal the sentence following a plea. *Marrow*, 772 F.2d at 528. The *Marrow* court pointed out that this amendment merely continues the distinction between the trial court's duty to advise of appellate rights after pleas of guilty and not guilty. *Id.* at 528-29. As the court stated:

> The plain language of the amendment, providing that the judge shall advise the defendant of his right to appeal the sentence, rather than his right to appeal the conviction, indicates that Congress intended to continue the current distinction between the judge's duty to advise of the right to appeal after pleas of guilty and not guilty. The legislative history unequivocally supports this conclusion[] [quotation omitted].

Marrow, 772 F.2d at 528-29.

The current version of Rule 32 maintains this distinction. Rule 32(c)(5), provides, in pertinent part:

> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis.

Federal Rules of Criminal Procedure, Rule 32(c)(5).[12/]

The *Marrow* court recognized that counsel's duty to advise his client is not coextensive with that of the court, and that in some cases counsel has a duty to advise his client of the right to appeal his post-plea conviction. *Marrow*, 772 F.2d at 529. Nevertheless, the *Marrow* court correctly believed that the reasons stated by the Advisory Committee were of some relevance. *Id.*

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12. Rule 32(c)(5) also provides: "If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant."

Thus, there is no absolute constitutional duty by counsel to advise a defendant of his appeal rights following a guilty plea. This principle supports the proposition that, in general, trial counsel has no Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights. If counsel has no absolute constitutional duty to advise a defendant of his post-plea appeal rights, it is hard to understand how counsel could have an absolute constitutional duty to obtain a waiver of such rights.

III.

A RULE OF PRESUMED PREJUDICE SHOULD NOT BE APPLIED WHERE, AS HERE, THERE IS NO REQUEST FOR AN APPEAL[13]

Further, the Warden submits that a rule of presumed prejudice should not be applied where, as here, there has been no request for an appeal.

The Warden's position is supported by this Court's recent decision in *Peguero v. United States*, 119 S.Ct. 961. In *Peguero*, this Court held that "a district court's failure to advise the defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission." *Id*. at 963. This Court went on to state that in the case before it, petitioner had full knowledge of his right to appeal, hence the district court's violation of Federal Rules of Criminal Procedure, Rule 32 by failing to inform him of that right did not prejudice him. *Id*. at 964-65. Shortly thereafter, this Court stated:

> Our decision in *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), does not hold otherwise. In *Rodriquez*, the Court held that when counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit. *Id*., at 329-330, 89 S.Ct. 1715. Without questioning the rule in *Rodriquez*, we conclude its holding is

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13. The Warden submits that this matter is fairly included in the question presented. Rule 14.1 of the Rules of the Supreme Court of the United States.

> not implicated here because of the District Court's factual finding that petitioner did not request an appeal.

Peguero, 119 S.Ct. at 965.

Likewise, in the present case, *Rodriquez's* holding is not implicated because of the District Court's factual finding that the Prisoner did not request an appeal. (J.A. 157-159 [F. & R. at 6-7]; J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, *Rodriquez's* rule of presumed prejudice is inapplicable.

IV.

TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE UNDER CALIFORNIA LAW; CALIFORNIA LAW COMPORTS WITH FEDERAL CONSTITUTIONAL REQUIREMENTS

Trial counsel clearly rendered effective assistance under California law. Further, the Warden submits that California law comports with the federal constitution.

California's legal landscape (at least as of January 1994, when the Prisoner's conviction became final) would not have required the filing of a notice of appeal. Indeed, the sentencing court was not required to advise the Prisoner of his appeal rights following his guilty plea. Cal. Rules of Court, Rule 470 (this rule is still in effect); *see also People v. Serrano*, 33 Cal.App.3d 331, 337-38, 109 Cal.Rtpr. 30, 33-34 (Cal.Ct.App. 1973) (no duty by trial court to advise defendant of right to appeal after guilty plea).

In a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." § 1240.1(a). However, under the plain terms of the statute, this duty applies only to attorneys who represented a defendant "at trial." The instant case was a guilty plea case.

Under § 1240.1, defense counsel is required to file a notice of appeal only if there are arguably meritorious appellate issues or the defendant directs that an appeal be filed. § 1240.1(b). These statutory provisions are still in effect.

The Warden submits that, based on the certified record, there do not appear to have been any arguably meritorious appellate issues. In the present case, trial counsel was representing the Prisoner, an indigent, who entered a guilty plea to second degree murder. Trial counsel testified that in her opinion the only grounds for appealing the sentence would have been that the sentencing court abused its discretion in denying probation, and such a claim would almost certainly fail. (J.A. 114-115 [Evid. Hrg. Tr. at 43-44].) Assuming arguendo that issues relating to the validity of the plea could be raised on appeal (§ 1237.5), there do not appear to be any such issues. (J.A. 16-30 [Plea Tr.].) It is hard to imagine that the Prisoner could mount a serious challenge to the jurisdiction of the superior court.[14]

Again, the District Court found that there was no request to file an appeal. (J.A. 157-159 [F. & R. at 6-7].) The Magistrate Judge found that had the Prisoner requested that trial counsel file a notice of appeal, she would have done so. (J.A. 133 [Evid. Hrg. Tr. at 76].) Thus, at least as of January 1994, California law would not have required the filing of a notice of appeal in the present case. California law remains the same today. § 1240.1(b).

The Warden submits that California law comports with federal constitutional requirements. *See, e.g.*, *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719; *Marrow*, 772 F.2d at 528.

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14. The California Constitution, Article VI, § 10, provides that except with regard to various writ proceedings, superior courts have original jurisdiction in all other causes except those given by statute to other trial courts.

V.

THERE ARE ADDITIONAL REASONS FOR DISAPPROVING *STEARNS* AND REVERSING *ORTEGA*

There are additional reasons for disapproving *Stearns* and reversing *Ortega*. *Stearns* is distinguishable from the present case and was wrongly decided.

A. *Stearns* Is Distinguishable

The Warden submits that *Stearns* (upon which *Ortega* relies) is distinguishable and was wrongly decided. *Stearns* is distinguishable because it involved review of a federal prisoner's 28 U.S.C. § 2255 motion and did not involve California law as does this case. *Stearns*, 68 F.3d at 329. The present case involves an appeal from a state court judgment and is subject to state procedural rules specifically limiting trial counsel's duties with respect to filing a notice of appeal (e.g., § 1240.1(b)). As previously discussed (Argument IV, *ante*), these state rules comport with federal constitutional requirements. Whatever merit the *Stearns* rule has in the federal context, it should not be extended to state court proceedings. In light of § 1240.1(b), it is difficult to understand how counsel could have had a duty to file a notice of appeal, let alone a duty to file one just because the Prisoner did not consent to the abandonment of his appeal.[15]

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15. Moreover, California has a rule requiring defendants to exercise personal diligence in ensuring that notices of appeal are filed. *Cf. In re Benoit*, 10 Cal.3d 72, 88-89, 514 P.2d 97, 108, 109 Cal.Rptr. 785, 796 (Cal. 1973). The Warden submits that this requirement comports with the federal constitution. *Ortega* conflicts with this requirement. This is yet another reason why *Ortega* improperly extended *Stearns* to state prisoner cases.

Moreover, *Stearns* involved a complex federal sentencing scheme which precluded trial counsel from assuming that the defendant did not want to appeal his sentence. *Stearns*, 68 F.3d at 330. In the present case, there were no meritorious grounds for appealing the Prisoner's sentence. (J.A. 114-115 [Evid. Hrg. Tr. at 43-44].) Thus, *Stearns* is distinguishable on this basis as well.

B. *Stearns* Was Wrongly Decided

Further, *Stearns* was wrongly decided. As noted, in *Stearns* the Ninth Circuit stated that the issue was whether the defendant consented to the failure to file a notice of appeal, rather than whether counsel ignored an explicit request to file. *Stearns*, 68 F.3d at 330. However, other circuits have explicitly held otherwise and have required such a request be made. *See, e.g., Castellanos*, 26 F.3d at 719. The Warden submits that *Castellanos* states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances and regardless of state law to the contrary (e.g., California law).

For these additional reasons, *Ortega* should be reversed and *Stearns* disapproved.

CONCLUSION

Accordingly, the Warden asks that this Court hold that, in general, trial counsel has no Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights. The Warden asks this Court to disapprove of *Ortega* and *Stearns* to the extent they are inconsistent with this holding. Finally, the Warden asks this Court to hold that the Prisoner is not entitled to relief, and to reverse the judgment of the Ninth Circuit.

Dated: June 29, 1999.

Respectfully submitted,

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APPENDIX A

The Text of Pertinent Constitutional Provisions, Statutes, and Court Rules:

(1) Sixth Amendment, United States Constitution
(2) California Penal Code § 1237.5
(3) California Penal Code § 1240.1
(4) California Rules of Court, Rule 31(d)
(5) California Rules of Court, Rule 470
(6) Federal Rules of Criminal Procedure, Rule 32

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

California Penal Code § 1237.5 provides:

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

This section shall become operative on January 1, 1992.

California Penal Code § 1240.1 provides, in pertinent part:

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document,

paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

California Rules of Court, Rule 31, provides, in pertinent part:

> (d) [Guilty or nolo contendere plea] If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after

> the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.
>
> If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.
>
> The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

California Rules of Court, Rule 470, provides:

> After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the

necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CRIMINAL PROCEDURE
FOR THE UNITED STATES DISTRICT COURTS
VII. JUDGMENT

Rules amendments received to 1-4-1999

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain--

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence--within or without the applicable guideline--that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing --unless the defendant waives this minimum period--the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence
report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence.

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make

either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court--in lieu of making that information available--must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements--made under subdivision (c)(3)(B), (C), (D), and (E)--by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing

notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime

under chapter 109A of title 18, United States Code.

(7)

No. 98-1441

In The

Supreme Court of the United States

ERNEST ROE, Warden,

Petitioner,

v.

LUCIO FLORES-ORTEGA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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37pp

QUESTION PRESENTED

Does the Sixth Amendment guarantee a criminal defendant the advice and guidance of counsel in deciding whether to exercise the right to appeal and in perfecting the appeal unless waived by the defendant?

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CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On October 13, 1993, Flores-Ortega, a popsicle vendor, entered a plea of guilty to a charge of second degree murder for a homicide occurring during a brawl outside a bar. He was represented by appointed counsel, public defender Nancy Kops. The court proceedings were conducted with the assistance of a Spanish-language interpreter.

Although Flores-Ortega denied the killing, he pleaded guilty pursuant to *People v. West*, 3 Cal.3d 595, 447 P.2d 409 (1970), which permitted him, under California law, to deny the crime to the court, but acknowledge the sufficiency of the evidence to convict him. During the course of plea proceedings, he stated repeatedly that he did not commit the crime, but was pleading guilty because his attorney had advised him to do so. J.A. 17-26.

At sentencing on November 15, 1993, Flores-Ortega's attorney urged the court to grant probation. J.A. 35-36. The court declined to do so, imposing a sentence of 15 years to life in prison and a $1,000 restitution fine. J.A. 40. After sentencing, the court said, "You may file an appeal 60 days from today's date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal." J.A. 40.

According to the findings made below, Flores-Ortega and Ms. Kops had a conversation immediately after sentencing from which Flores-Ortega inferred that Kops would be filing a notice of appeal. J.A. 133. Flores-Ortega, who speaks only Spanish, was then transported to Wasco State Prison, where he was placed in lock-up for 90 days while going through evaluation. District Court Rep.Tr. 6, 21. During this time, he was unable to communicate with counsel. District Court Rep.Tr. 6. As he explained, "you're not given any privileges at all. They just take you out to bathe, and they just lock you back up in your cell. You can't make a phone call, you're completely locked up. When you're locked up, you can't do anything." District Court Rep.Tr. 7.

After being transferred to Centinela State Prison, Flores-Ortega found out that his attorney had not filed a notice of appeal, so he filed a notice with the state court on March 24, 1994. District Court Rep.Tr. 26; Ninth Circuit E.R. 47-55. The Clerk of the Fresno County Superior Court refused to file the notice, and referred him to the Court of Appeal. Ninth Circuit E.R. 57. On August 12, 1994, the Fifth District Court of Appeal also declined to file his appeal. J.A. 42-44.

After the California Supreme Court denied a petition for writ of habeas corpus (J.A. 45), Flores-Ortega filed his habeas petition, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of California. J.A. 46-75. The petition alleged a claim of ineffective assistance of counsel for failing to perfect an appeal, to adequately consult with him regarding his right to appeal, or to instruct him on the means of perfecting an appeal in propria persona. J.A. 51.

The federal district court appointed the federal defender for the habeas proceedings and conducted an evidentiary hearing on January 24, 1997. The evidentiary hearing was limited to "the credibility of petitioner's assertions that trial counsel promised to file a notice of appeal on his behalf." J.A. 92.

Ms. Kops testified that at the time of Flores-Ortega's sentencing, her office did not have a policy concerning advising clients of their right of appeal. J.A. 123. She explained to the court that her "personal policy is that if a client has entered a plea and does not thereafter voice to me a change of heart, I would not discuss the right to appeal of his plea" or the right to appeal the sentence. J.A. 123-124. Ms. Kops did not recall any discussion with Flores-Ortega in court after sentencing, and she never met with him thereafter. J.A. 111, 114, 121, 124.[1] Flores-

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[1] Defense counsel Kops filed a declaration, stating that she had met with Flores-Ortega one time between the guilty plea and the sentencing, for 20 minutes on the day before sentencing to review his presentence report. J.A. 95. Although she had noted in the case file that she should "bring appeal papers" to the sentencing, she did not recall why she wrote those words.

Ortega testified that immediately after sentencing, he "asked [counsel] if she was going to continue trying to fight my case, and she said, yes, that she was going to try to file an appeal." District Court Rep.Tr. 3.

At the close of the evidentiary hearing, the magistrate judge found that Flores-Ortega "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." J.A. 133. In addition, the magistrate judge found that there was a conversation between Flores-Ortega and Ms. Kops after sentencing from which Flores-Ortega inferred that she would file a notice of appeal and that it was quite clear that Flores-Ortega had not consented to counsel's failure to file a notice of appeal. J.A. 132-133. Nevertheless, the magistrate judge found that Flores-Ortega had not "proven by a preponderance of the evidence" that defense counsel had promised to file a notice of appeal. J.A. 133.

The magistrate judge concluded that lack of consent to the failure to file a notice of appeal would entitle a criminal defendant to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995). He recommended denial of the petition, however, on the ground that Flores-Ortega was barred from such relief by *Teague v. Lane*, 489 U.S. 288 (1989). J.A. 152-161. Without elaboration, the district court adopted the magistrate judge's recommendations and denied the habeas petition. J.A. 162-163.

J.A. 96. Her file notes did not reflect any conversation with Flores-Ortega on the day of sentencing or any time thereafter regarding an appeal. J.A. 96.

The court of appeals reversed and remanded on the ground that *Stearns* was not a new rule and instructed the district court to issue a conditional writ releasing Flores-Ortega from state custody unless the state trial court vacated and reentered the judgment and conviction, allowing a fresh appeal. J.A. 168. The court held that, unless the defendant consents to the failure to file a notice of appeal, it is ineffective assistance of counsel to waive the right of appeal. J.A. 166.

SUMMARY OF ARGUMENT

This Court has held that among the most "basic duties" imposed upon defense counsel by the Sixth Amendment is the duty "to consult with the defendant on important decisions." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Constitution guarantees that, when faced with critical decisions, a criminal defendant receive "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The decision whether to appeal – like the decisions whether to plead guilty, to waive jury trial or to testify – is such a decision. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Thus, counsel's basic duties in a criminal case include the duty to advise the defendant of the right to appeal and the nature of the appellate process, to explain whether there are grounds for appeal, to determine whether the defendant wishes to appeal, and to file a notice of appeal if the defendant so desires.

Judicial notification of appeal rights cannot substitute for the advice and assistance of counsel. Mere knowledge of the right to file a notice of appeal is insufficient to

permit a defendant to make an informed decision, in the context of his or her particular case, whether to pursue an appeal. Moreover, many jurisdictions do not require an advisement of appeal rights following a plea. Matters such as the nature of appeals, rules and procedures on appeal, and possible claims on appeal are beyond the knowledge of the vast majority of defendants. Without the assistance of counsel, criminal defendants, often lacking education or the ability to speak or understand English, cannot make an intelligent decision regarding the fundamental decision whether to appeal.

A defendant does not waive the right to assistance of counsel by pleading guilty; a defendant's statutory and constitutional rights are subject to violation during sentencing no less than at trial, and an appeal may be necessary to vindicate those rights. With the adoption of complex sentencing schemes in many jurisdictions, sentencing appeals are an important component of appellate jurisprudence, ensuring the legality of sentences as well as the fair and uniform application of sentencing laws. Moreover, appeals involving the change-of-plea proceedings are not uncommon. Without assistance of counsel, a defendant may not even know that fundamental constitutional deprivations are subject to further review.

Failure to advise the defendant and determine whether he wants to appeal clearly falls below accepted standards of professional practice. The failure to determine whether an incarcerated, indigent defendant wishes to appeal effectively deprives the defendant of the right to make a fundamental decision in his case.

In the absence of an informed waiver of the right to appeal by the defendant, counsel must take the steps necessary to perfect an appeal. The presumption of prejudice applicable at the trial stage when there is a denial of counsel should apply with equal force at the appellate stage. In the alternative, a defendant should be granted relief upon showing that there is a reasonable probability that, but for counsel's abandonment, he would have pursued an appeal.

ARGUMENT

MR. FLORES-ORTEGA WAS DENIED HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL REGARDING HIS RIGHT TO APPEAL

A. The Sixth Amendment Guarantees a Criminal Defendant the Right to the Advice and Guidance of Counsel Regarding the Right to Appeal

The Sixth Amendment guarantees an accused the right to effective assistance of counsel at every stage of a criminal prosecution, from commencement of the proceedings through final resolution of the charges at the trial level. U. S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984). Although the Constitution does not require an appeal of right from a criminal conviction, *McCane v. Durston*, 153 U.S. 684 (1894), where such an appeal is provided,[2] the defendant has a Sixth

[2] In forty-seven of the fifty states, the right to appeal in a criminal case exists as a matter of right. *See* Marc M. Arkin, *Rethinking the Right to a Criminal Appeal*, 39 UCLA L.Rev. 503, 513-514 (1992).

Amendment right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 388, 392 (1985). One requirement of effective assistance on appeal is that counsel take all steps necessary to carry out the client's decision to appeal. *Id.*

Whether to exercise the right of appeal is one of those critical decisions reserved for the defendant personally, rather than counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). These decisions include whether to plead guilty, to waive a jury trial, to testify in his or her own behalf, and to pursue an appeal. *Id.* While the defendant is entitled to make those decisions personally, each of them involves the potential waiver of a critical right and requires "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The "basic duties" of counsel include the duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. Criminal defendants, often illiterate and unable to speak or understand English, cannot be expected to make what the Court has termed the "fundamental decision" regarding appeal, *Jones, supra*, without the advice and assistance of an attorney, for several reasons.

First, the very existence of a right to appeal in a particular jurisdiction, particularly following a guilty plea, is not a matter of common knowledge, nor are the actions that must be taken and the deadlines that must be met in order to exercise that right. Second, although some states require the sentencing judge to advise criminal

defendants of their right to appeal in all cases,[3] in at least one-third of the states, including such populous states as California and New York, judicial advisement of appeal rights is not required following a guilty plea. *See* Appendix A. Third, bare knowledge that a right to appeal may exist does not enable a defendant to make an informed decision whether to pursue an appeal. The appeal process "is governed by intricate rules that to a lay person would be hopelessly forbidding." *Evitts*, 469 U.S. at 396. The scope of an appeal, the issues that can be raised on appeal, and the standards of appellate review vary from state to state, especially when the defendant has pleaded guilty. These "complex rules and procedures" are within the particular knowledge of attorneys, not lay clients. *Id.* at 395, n. 6.

Finally, the critical consideration for the client's decision whether to appeal will be the effect of these legal rules regarding appeals on his particular case. Even if a defendant understands he has the right to appeal, he cannot make an informed decision without professional advice on the potential for appellate relief in his case. Only an attorney can provide the necessary information and advice in this regard. *See Rodriquez v. United States*, 395 U.S. 327, 330 (1969).

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[3] *E.g.*, Michigan Court Rule 6.425(E)(1)-(2) (requiring sentencing court to advise defendants who pleaded guilty or were convicted following a trial of right to appellate review); Iowa Rule of Criminal Procedure 22 (sentencing court must advise all criminal defendants of right to appeal); New Jersey Rule of Court 3.21(h) (all criminal defendants must be advised of right to appeal after imposition of sentence).

For all of these reasons, although the decision whether to appeal is reserved for the client personally, he is entitled to the advice and assistance of a lawyer in making that decision. As the Solicitor General observes, "[g]iven that the nature of appeals, and the possible legal claims that might be advanced on appeal, are beyond the knowledge of most defendants, it would be anomalous if the defendant did not also have a right to assistance of counsel in understanding the appeal process and in making the decision whether to appeal." United States Amicus Brief at 8.

The basic duty to consult with the defendant regarding the other fundamental decisions reserved to the defendant is well established. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (effective assistance of counsel required in connection with decision to plead guilty). Contrary to the State's position (Pet. Br. at 17, 20), the Sixth Amendment right to counsel mandates similarly competent advice and consultation regarding the right to appeal. *E.g., Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (recognizing counsel's duty to advise client of "his right to appeal, the manner and time in which to appeal and whether an appeal has any hope of success"), *cert. denied*, 397 U.S. 1007 (1970); *Lumpkin v. Smith*, 439 F.2d 1084, 1085 (5th Cir. 1971) (counsel must advise defendant of right to appeal, procedure and time limits, and right to counsel on appeal); *Baker v. Kaiser*, 929 F.2d 1495, 1498-1500 (10th Cir. 1991) (counsel must give advice about whether there are grounds for appeal, the probabilities of success,

advantages and disadvantages of an appeal, and determine whether defendant wants to appeal).[4]

Failure to provide this consultation on the right to appeal to the defendant clearly falls below professional

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[4] The State relies on three circuit decisions to argue that defense counsel is required to file a notice of appeal only when requested by the defendant. Pet. Br. at 14. None of these decisions adequately addresses the issue of counsel's duty to provide the client advice and guidance regarding his right to appeal. *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) merely states in dicta, without citation or further discussion, that "[t]he Constitution does not require lawyers to advise their clients of the right to appeal." In *Morales v. United States*, 143 F.3d 94 (2d Cir. 1998), the only issue was whether "the lawyer's failure to advise Morales of his right to appeal *after sentencing* constituted a constructive denial of counsel and therefore was prejudicial *per se*." *Id.* at 94 (emphasis added). It was undisputed that Morales' lawyer had met with him between plea and sentencing, had discussed with him why the evidence did not support a two-level gun enhancement, had told him he had a right to appeal and that the sentencing judge would so advise him, and specifically advised him that if the sentencing judge imposed the enhancement he could appeal that decision. *Id.* at 95. It was nearly a year after sentencing that Morales filed a pro se motion claiming that the lawyer's failure to repeat the advice after sentencing deprived him of effective assistance. *Id.* at 96. Finally, in *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994), both defendants claimed that they had requested their counsel to file a notice of appeal, and the court of appeals remanded the case to the district court for an evidentiary hearing on that issue. *Id.* at 720. The court's dicta regarding defense counsel not having a duty to advise of the right to appeal rested upon the unsupported premise that "most defendants know about the possibility of appeal and cannot complain if they are not furnished redundant information." *Id.* at 719.

standards. The American Bar Association Standards for Criminal Justice provide:

> (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.

ABA Standards for Criminal Justice, § 4-8.2 (3d Ed. 1993). The ABA standards are accepted as guidelines in determining the parameters of constitutionally required effective assistance of counsel. *Strickland*, 466 U.S. at 687; *Jones v. Barnes*, 463 U.S. at 753, n. 6.[5]

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[5] This duty of advice and counsel is also fully consistent with California law. *See* Cal. Pen. Code § 1240.1(a) (Deering 1999) (trial counsel duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal"). Contrary to the State's argument (Pet. Br. at 23), section 1240.1(a) is not limited to cases in which the defendant has stood trial. Rather, the language "at trial" as used in that section refers to the attorney at the trial level, in contrast to appellate counsel. This conclusion is reinforced by the introductory phrase of that section, which makes the section applicable to "any noncapital criminal, juvenile court, or civil commitment case wherein the

Likewise, the Restatement of the Law establishes a duty to consult regarding decisions to be made by the defendant: "A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Restatement (Third) of Law Governing Lawyers § 31(3) (Proposed Final Draft No. 1 1996). This need to "communicate and consult", according to the Restatement, "is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing." *Id.* cmt. b.

The State argues that requiring counsel to advise and consult regarding the right to appeal is superfluous because of an independent duty of the trial court to advise a defendant of his appellate rights. Pet. Br. at 15. However, as set forth in Appendix A, over one-third of the states do not require an advisement of appeal rights following a conviction based on a guilty plea. Moreover, a bare advisement, such as the one in this case ("You may file an appeal 60 days from today's date with this Court" (J.A. 40)), is inadequate to permit the defendant to make an intelligent decision whether to appeal. Because criminal defendants include "[t]hose whose education has been limited and those, like petitioner, who lack facility in the English language" (*Rodriquez*, 395 U.S. at 330), notwithstanding any judicial advisement, the defendant will often have, as here, "little or no understanding of what the process, what the appeal process was, or what

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defendant would be entitled to the appointment of counsel on appeal if indigent." *Id.*

appeal meant at that stage of the game." J.A. 133. Therefore, "[b]y itself . . . , this advice [of a right to appeal] is insufficient to satisfy the right to counsel." *Baker*, 929 F.2d at 1499.

B. Counsel's Sixth Amendment Duty to Provide Advice and Consultation Regarding the Right to Appeal Applies when the Conviction is Based Upon a Guilty Plea

The State contends that the constitutional requirement of advice and consultation regarding the right to appeal should not apply to defendants whose convictions are based upon guilty pleas, as opposed to jury or court trial, Pet. Br. at 10-20, and that appeals are uncommon after a plea of guilty or no contest. Pet. Br. at 11. That many defendants choose not to appeal says very little about the fundamental right to make the choice. Regardless of whether the defendant has stood trial or entered a guilty plea, a decision to forego an appeal irrevocably surrenders an important right and eliminates all possibility of vindicating rights previously violated. In any event, petitioner vastly understates the frequency of post-plea appeals. Although appeals challenging the validity of the guilty plea itself may be infrequent, sentencing appeals are increasingly common.[6]

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[6] *See, e.g.*, Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U.L.Rev. 1441, 1492 (1997) (65% of federal criminal appellate decisions in 1993-94 were sentencing appeals).

The frequency of sentencing appeals is not surprising, given the complexity of modern sentencing law. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 169 (1995). Sentencing appeals raise a wide range of issues, such as whether the sentence exceeded statutory limits, whether the judge relied on prohibited factors or unreliable information, and whether sentencing enhancements were properly applied. Moreover, appeals following a guilty plea generally have a relatively high success rate. *E.g., id.* at 190 (1992-1993 study of two appellate courts shows 24% of guilty plea appeals resulting in some form of relief). Besides correcting errors in individual sentences, appeals following guilty pleas allow systematic development of the parameters of sentencing law[7] and also ensure its uniform application.[8] That the scope of appeal may be narrower

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[7] For example, in enacting the Federal Sentencing Reform Act of 1984, Congress believed that appellate review of sentencing would promote "case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the [U.S. Sentencing] Commission in refining the guidelines as the need arises." *See* S.Rep.No. 98-225, 149, 151 (1983).

Congress' hopes in this regard have not been unfulfilled. *See* United States Sentencing Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining 56-60 (1991) ("[a] body of sentencing law, notably similar among circuits in most respects, has quickly developed. The Commission has benefitted from this evolving body of appellate law.")

[8] For this reason, Minnesota, a state that pioneered in indeterminate sentencing reform, has disallowed waivers of

following conviction by plea as opposed to trial (Pet. Br. at 12) makes the need for professional advice regarding the right to appeal greater, not less. Counsel's advice is essential on such critical matters as whether the defendant can appeal the conviction or only the sentence, what issues have been waived by the guilty plea, what additional actions are necessary to take a post-plea appeal,[9] what issues are more properly raised in a habeas petition, and the advantages and disadvantages of pursuing an appeal.[10]

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appeal of sentencing error. In *Ballweber v. State*, 457 N.W.2d 215 (Minn.Ct.App. 1990), the court found that appellate review of sentences was an essential element of that state's sentencing guideline system and that "vindication of the Guidelines' stated goals . . . of reducing sentencing disparity, and providing uniformity in sentencing" required a ban on waivers of sentencing appeals.

[9] For example, Cal. Pen. Code § 1237.5 (Deering 1999) requires that a criminal appellant obtain a certificate of probable cause where the conviction is based upon a guilty plea, except when the appeal challenges only the sentence or other aspects of the proceedings occurring after the entry of the guilty plea.

[10] In the latter respect, an uncounseled defendant may be unaware that choosing to appeal may risk serious adverse consequences, such as triggering a cross-appeal by the prosecution or exposing the defendant to imposition of a more severe sentence in later proceedings. *See Wasman v. United States*, 468 U.S. 559 (1984) (greater sentence of confinement imposed following retrial after successful appeal). Similarly, in California, a claim that a sentence is unauthorized can be raised for the first time on a defendant's appeal, either by the prosecution without filing a cross-appeal or by the appellate court *sua sponte*. *E.g., People v. Dotson*, 16 Cal. 4th 547, 554, fn. 6, 66 Cal.Rptr. 2d 423 (1997); *People v. Scott*, 9 Cal.4th 331, 354, 885 P.2d 1040 (1994). As a result, it is not uncommon for a California defendant not only to have his conviction affirmed, but also to

Finally, the State argues that when a defendant pleads guilty, he manifests a desire to terminate the litigation. Pet. Br. at 13. That claim is purely speculative and is inconsistent with the frequent reservation or waiver of appeal rights in plea agreements. In this case, the plea agreement contained no such waiver. In any event, a desire to terminate litigation on the part of the defendant is generally conditioned on the absence of any legal errors in the conviction or sentence which could be redressed on appeal.

C. The Sixth Amendment Requires that, After Advising and Consulting with the Defendant Regarding the Right to Appeal, Defense Counsel Take All Steps Necessary to Preserve the Right to Appeal, Including Filing a Timely Notice of Appeal, Unless the Defendant Decides Not to Appeal

The right to appeal a criminal conviction and sentence is a fundamental right which defense counsel is obligated to preserve unless the defendant has elected to waive it. Any such waiver must be "an intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[11] In many jurisdictions,

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have his sentence increased on appeal. *E.g., People v. Davis*, 71 Cal.App.4th 1492, 84 Cal.Rptr.2d 628 (1999) (conviction affirmed; sentence raised from 30 years-life to 80 years-life); *People v. Ingram*, 40 Cal.App.4th 1397, 48 Cal.Rptr.2d 256 (1995) (convictions affirmed; sentence increased from 27 years-life to 61 years-life).

[11] Federal courts have consistently held that an in-court waiver of appeal pursuant to a plea agreement is unenforceable

the right to appeal is lost unless a notice of appeal is filed within a very short time period. *E.g.*, Fed.R.App.P. 4(b)(1)(A) (notice of appeal in a federal criminal prosecution must be filed within ten days of the entry of judgment). It will often be difficult for a defendant to make an intelligent decision on whether to appeal within such a short time. Furthermore, compliance with such jurisdictional deadlines may be complicated by the defendant's inability to communicate after sentencing. *See Peguero v. United States*, 119 S.Ct. 961, 964 (1999) ("It will often be the case that, as soon as sentencing is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney"). Therefore, counsel must be diligent in protecting the client's right to appeal.

In the course of counseling the client regarding the right to appeal, counsel must determine whether he wishes to pursue an appeal or not. *See* Restatement (Third) of Law Governing Lawyers § 31 cmt. e (Proposed Final Draft No. 1, 1996) ("When a client is to make a decision . . . a lawyer must bring to the client's attention the need for the decision to be made"). This imposes no great additional burden on the lawyer. If the defendant expressly requests an appeal, there is no question that the attorney has a duty to file the notice of appeal. *See, e.g.*, Brief of Petitioner at 14. It is also undisputed that if the

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unless "the record 'clearly demonstrates' that the waiver was both knowing . . . and voluntary." *United States v. Reading*, 82 F.3d 551, 557 (2d Cir. 1996) (citations omitted); *see also United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992). An out-of-court appeal waiver following conviction should be subject to no lesser standard.

defendant chooses to forego an appeal, the attorney need not file a notice of appeal. *See, e.g., Meeks v. Cabana*, 845 F.2d 1319 (5th Cir. 1988). The issue is what rule should govern in the small number of remaining cases, where for one reason or another the client has not communicated to his attorney his decision on whether to appeal. In such cases, counsel must preserve the client's right to appeal. *See United States v. Sterns*, 68 F.3d 328, 329 (9th Cir. 1995); *Romero v. Tansy*, 46 F.3d 1024, 1031 (10th Cir. 1995); *United States v. Tajeddini*, 945 F.2d 458, 468 (1st Cir. 1991) (per curiam); *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1992); *but see, e.g., Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998). A failure to do so would take a fundamental decision from the defendant which is his alone to make. Only when the client has been counselled regarding the right to appeal and communicated that he does not want to appeal may counsel properly forego filing a notice of appeal.

D. Where Defense Counsel Fails to Perform Her Duty to Advise and Counsel Regarding Appeal and/or to Preserve the Right to Appeal Absent a Waiver by the Client, the Criminal Defendant is Entitled to a New Appeal

In *United States v. Cronic*, 466 U.S. 648, 659 (1984), this Court held that, where there has been a "complete denial of counsel," no specific showing of prejudice is required and prejudice will be presumed. *Id.* at 659. While the Court's decision in *Cronic* focussed on denial of counsel at a critical stage of a criminal trial, in *Penson v. Ohio*, 488 U.S. 75 (1988), this Court held that the presumption of prejudice from denial of counsel was also applicable at

the appellate stage. *Id.* at 88 ("Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage [citation], the presumption of prejudice must extend as well to the denial of counsel on appeal"). Following *Penson*, several courts of appeal have held that, where trial counsel fails to protect the client's right to appeal, "[t]he convicted defendant has not obtained the benefit of any adversary presentation on appeal," and "[j]ust as prejudice was presumed in *Penson* to flow from the absence of an effective appellate advocate, so too, we think, must prejudice be presumed here." *United States v. Tajeddini*, 945 F.2d at 468; *see also United States v. Sterns*, 68 F.3d at 330; *Romero v. Tansy*, 46 F.3d at 1030; *Lozada v. Deeds*, 964 F.2d at 957-958; *Estes v. United States*, 883 F.2d 645, 649 (8th Cir. 1989).[12]

Alternatively, if a showing of prejudice is necessary under *Strickland*, it should be sufficient to show a reasonable probability that, but for counsel's deficient performance, the defendant would have directed his lawyer to pursue an appeal. As the Solicitor General points out, this standard parallels that established by the Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), for cases where the defendant claims ineffective assistance of counsel when deciding to plead guilty. United States Amicus Brief at 28-29. In each instance, the standard focuses on what the criminal

[12] Other courts have applied a presumption of prejudice, but only where the defendant had requested that a notice of appeal be filed and counsel had failed to do so. *E.g., Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993).

defendant would have elected to do if competently counseled, and restores the defendant to the position he would have occupied if so counseled. This standard avoids penalizing the defendant for failing to take an appeal in the first instance when the failure is attributable to attorney error.

Nor should the defendant be required to show "substantial grounds for appeal," as suggested by amicus for petitioner. CJLF Amicus Brief at 17. As the Court has previously recognized, requiring such a showing would impose an undue burden on a defendant whose counsel had defaulted in her duties. "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam); *Peguero*, 119 S.Ct. at 965-966 (O'Connor, J., concurring) (noting that habeas petitioners, who are often without "a lawyer to identify and develop arguments on appeal," should not be required to show "meritorious grounds for appeal" where failure to file timely appeal is due to court's error).

In *Rodriquez*, the lower courts had held that a defendant claiming a denial of the right to appeal must show what errors he would raise on appeal and that denial of an appeal had caused prejudice. *Id.* at 329. This Court refused to impose such an onerous burden:

> Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to

> be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one.

Id. at 330.[13] Here, as in *Rodriquez*, the defendant should be afforded relief in the nature of a new appeal, without a requirement that he prove his likelihood of success on that appeal.

E. Since Flores-Ortega was Denied His Sixth Amendment Right to the Advice And Assistance of Counsel Regarding the Right to Appeal, He is Entitled to Habeas Relief

As the Solicitor General recognizes, "[r]espondent's right to counsel . . . included the right to consult with a lawyer, at or around the time that judgment was entered against him, concerning the possibility and advisability of pursuing an appeal from his conviction or sentence." United States Amicus Brief at 13. The record is clear that respondent did not receive the professional advice and guidance required by the Sixth Amendment.[14]

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[13] *See also Evitts*, 469 U.S. at 394 n. 6 (where appeal was dismissed because counsel failed to file statement of appeal required by rule, "counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all.")

[14] Contrary to the suggestion of amicus for petitioner (CJLF Amicus Brief at 18-20), relief for Mr. Flores-Ortega is not barred by *Teague v. Lane*, 489 U.S. 288 (1989). The rule urged by the defendant, that counsel has a Sixth Amendment duty to advise and consult with a criminal defendant regarding his right to appeal, is dictated by long-established precedent. In *Strickland*, this Court established a "basic duty" of defense counsel to "consult with the defendant on important decisions." *Strickland*, 466 U.S. at 688. In *Jones v. Barnes*, the Court held that the right to appeal was such a "fundamental decision" that it must be reserved to the client personally. *Jones*, 463 U.S. at 751. *A fortiori*, the "fundamental" decision to appeal, like the other personal decisions entrusted to the defendant under *Barnes*, is an "important" decision as to which counsel has a Sixth Amendment duty to provide consultation and advice under *Strickland*.

Respondent's attorney testified that her office had no policy with regard to advising clients of their right to appeal, that her personal policy was not ordinarily to discuss the right of appeal with her clients, and that she failed to visit Flores-Ortega following sentencing. J.A. 118, 123-124. At no time during the evidentiary hearing did she claim to have ever consulted with Flores-Ortega regarding his appellate rights. Flores-Ortega's testimony regarding discussion of appeal was that, immediately following pronouncement of sentence, he asked his attorney if she was going to continue fighting his case, and she said she was going to try to file an appeal.[15] The magistrate judge found that there was a conversation after sentencing from which Flores-Ortega inferred that his counsel would file a notice of appeal, but that Flores-Ortega "had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." J.A. 133. The magistrate

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[15] Ms. Kops did not recall any discussion following sentencing. J.A. 126.

judge also found that while Flores-Ortega had not proven that defense counsel had promised to file a notice of appeal, it was clear that he had not consented to her failing to do so. J.A. 132, 133, 154.

Thus, it is abundantly clear that Flores-Ortega was denied his Sixth Amendment right to advice and assistance of counsel in preserving his right to appeal. Counsel's vital function was rendered meaningless by her failure to advise and consult with her client regarding appeal. The Court should order that Mr. Flores-Ortega be granted habeas relief without any further showing of prejudice. *See*, pp. 19-20, *supra*.

Alternatively, had counsel adequately consulted with Flores-Ortega regarding an appeal, it is reasonably probable that she would have understood his desire to appeal and would have filed a notice of appeal. *See*, pp. 20-21, *supra*. The most telling proof of his desire to appeal is that he did, in fact, file a notice of appeal only four months after the sentencing. The record is clear that the only reason that he did not file earlier is that he was unable to contact his lawyer for the first ninety days due to his lock-down status while going through evaluation. After being released from lock-down, he learned that a notice of appeal had not been filed and sought to make the required filing, only to have it rejected as untimely. Under these circumstances, the court of appeals was clearly correct in granting relief.

CONCLUSION

While the right to appeal is a valuable right, it is one which a criminal defendant can readily lose by default if not provided the advice and guidance of counsel. The Sixth Amendment therefore requires that a defendant's lawyer advise and consult with her client regarding the right of appeal and then take the steps necessary to preserve that right, unless the client elects not to appeal. In the present case, Flores-Ortega, a Spanish-speaker with limited education, was given no advice or counsel regarding appeal by his public defender, and she failed to protect his right of appeal by filing a notice of appeal, even though (as the lower courts found) he never consented to abandonment of his appeal rights. Under such circumstances, the Court should affirm the court of appeals ruling that Flores-Ortega is entitled to habeas corpus relief, unless provided a new state appeal.

Dated:

ANN H. VORIS
Assistant Federal Defender

Counsel of Record for
Lucio Flores-Ortega

APPENDIX A

States in which judicial advisement of appeal rights is not required following a guilty plea

Arkansas – No duty of court of advise defendant of right to appeal sentence. *See* Ark.R.Crim.P. Rule 24.4 and Ark. Code Ann. § 16-90-105 (Michie 1999) (requiring court to advise of right to appeal after verdict of guilt by jury or factfinder; no mention of duty to advise pleading defendant of appeal right).

California – California Court rule 470 states that trial court must advise defendant of his or her right to appeal after conviction. Yet, according to *People v. Serrano,* 33 Cal. App.3d 331, 109 Cal. Rptr. 30 (3rd Dist. 1973), Rule 470 does not apply to defendants who have entered a guilty plea.

Connecticut – No duty to advise defendant of right to appeal. *See* Conn. Super. Ct. § 39-19 (1999) (advice to defendant upon acceptance of plea; no mention of duty to advise pleading defendant of appeal right); Conn. Super. Ct. § 43-30 (1999) (notification of right to appeal conviction only after trial or where there has been adverse decision upon habeas corpus writ).

Delaware – Court has no duty to inform pleading defendant of his or her right to appeal; also, no such duty with respect to any defendant who has counsel. *See* Del.J.P.Crim.R. 32 (1998).

Hawaii – No duty of court to advise defendant who enters a guilty plea of right to appeal. Further, court has

no duty to advise any defendant with counsel of defendant's right to appeal. Notification of this right is given only to pro se defendants. *See* HRPP, Rule 32(b) (1998).

Louisiana – No duty to advise defendant of right to appeal. *See* La. C.Cr.P. Art. 556.1 (1998) (listing duties of court when accepting guilty plea; no mention of duty to advise pleading defendant of appeal right); *see also State ex rel. Jackson v. Henderson*, 260 La. 90, 255 So.2d 85 (1971) (listing rights court must advise defendant).

Massachusetts – "The clerk shall have no duty to advise the defendant of any right to appeal after sentence is imposed following a plea of guilty." ALM Super. Ct. Rule 65 (1999) (Annotated Laws of Massachusetts).

Montana – No statute or rule requiring judicial advice to defendant of right to appeal.

Nebraska – No duty to advise defendant of right to appeal. *See State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986) (requiring court to inform defendant of rights, no mention of right to appeal).

New York – No statute or court rule providing trial court must advise defendant of right to appeal after guilty plea.

North Carolina – No duty to advise defendant of right to appeal. N.C. Gen. Stat. § 15A-1022 (1999) (listing advisements required by court when accepting guilty plea; no mention of duty to advise pleading defendant of appeal right).

North Dakota – No duty to advise defendant of right to appeal. *See* N.D.R. Crim. P. 32 (1997) ("the court is under no duty to advise the defendant of any right of appeal after sentence is imposed following a guilty plea).

Rhode Island – Trial courts do not advise of right to appeal illegal sentence. *See* RI Super. R. Crim. P. 32 (1997).

South Carolina – No duty to advise defendant of right to appeal. *See Roberts v. State*, 275 S.C. 341, 271 S.E.2d 115 (1980) (indicating no requirement to advise defendant of right to appeal); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (finding meritless defendant's claim based on trial courts failure to advise defendant of right to appeal).

South Dakota – No duty to advise defendant of right to appeal. *See* S.D. Codified Laws § 23A-27-3 (1999) (requiring court to advise defendant of right to appeal at sentencing if defendant pleaded not guilty; no other mention of duty to advise defendant of appeal right).

Vermont – No duty of court to advise defendant of right to appeal. *See* Vt.R.Crim.P. 32 (1998) ("there is no duty on the court to advise the defendant of any right to appeal after sentence is imposed or deferred following a plea of guilty. . . . ").

Virginia – No duty to advise defendant of right to appeal. *See* Va. Sup. Ct. Form 6 (1998) (stating trial court need not inform defendant that guilty plea does not waive right to appeal).

Wyoming – No duty to advise defendant of right to appeal. *See* Wyo.R.Crim.P., Rule 32 (1998) (requiring defendants who stood trial and were convicted to be advised of appeal rights; no mention of duty to advise pleading defendant of appeal right).

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No. 98-1441

OCTOBER TERM, 1998

ERNEST C. ROE, Warden,

Petitioner,

v.

LUCIO FLORES-ORTEGA,

Respondent.

I, the undersigned, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of Sacramento, in which County the below-stated mailing occurred, and not a party to the subject cause.

I have served the within Brief for Respondent to: William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, one original copy, and, all parties required to be served have been served by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and deposited at the U. S. Post Office by me at Sacramento, California, on the Fifth day of August, 1999. There is a delivery service by U.S. Mail at each place so addressed.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated at Sacramento, California, August 5, 1999.

/s/ Quin Denvir

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(9)

No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST C. ROE, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

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ERNEST C. ROE, *Petitioner*,

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LUCIO FLORES ORTEGA, *Respondent*.

ARGUMENT[1]

I.

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO APPEAL A CRIMINAL CONVICTION

Respondent Ortega ("the Prisoner") argues that the "right" to appeal is a "fundamental right" which counsel must preserve unless the defendant waives it. Resp. Br. at 17. As the Prisoner and amicus National Association of Criminal Defense Lawyers ("NACDL") acknowledge, there is no federal constitutional right to appeal a criminal conviction. *McKane v. Durston*, 153 U.S. 684, 687 (1894); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996); Resp. Br. at 7; NACDL Br. at 6 n.3. Thus,

1. Petitioner ("the Warden") does not repeat all of the arguments made in the Brief for Petitioner. The failure to repeat a previously-made argument should not be construed as a waiver of such argument.

the right at stake in the present case is not a federal constitutional right. It follows that the "right" to appeal a criminal conviction and sentence is not a "fundamental right" which defense counsel must preserve unless the defendant waives it. Resp. Br. at 17.

Where the state creates a right to appeal there are constitutional implications. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). However, these constitutional implications do not include an absolute right to counsel's advice concerning appeal after a guilty plea. *See e.g., Marrow v. United States*, 772 F.2d 525, 528 (CA9 1985). Nor do they include an absolute right to file a belated post-plea appeal unless the defendant consented to the abandonment of his appeal.

II.

THE PRISONER FAILS THE *STRICKLAND* TEST BECAUSE HE DOES NOT SHOW ANY PREJUDICE FROM THE ALLEGED ERRORS BY COUNSEL

Amicus Criminal Justice Legal Foundation (CJLF) has argued persuasively for the application of the "*Strickland*" prejudice standard. CJLF Br. at 8-17. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), requires defendants to make two showings to establish a Sixth Amendment violation based on ineffective assistance of counsel: first, that counsel's performance was so lacking as to fall below an objective standard of reasonableness; *and* second, actual prejudice from the inadequate performance, meaning that there is a "reasonable probability" that the outcome would have been different but for counsel's errors. *Id.* at 687-90. The Prisoner has not even attempted to show that he had any grounds for a meritorious appeal. Nor could he. Petr. Br. at 24. Absent such a showing he cannot satisfy the prejudice prong of the test.[2]

The natural reading of the prejudice prong is that the defendant must show that he would have prevailed on the merits had adequate counsel been provided. The Prisoner's refusal even to address the substance of his hoped-for appeal means he fails that test. The Prisoner therefore asserts that he is prejudiced if he would have filed an appeal had he been given adequate counsel, regardless of the merits of the appeal. Surely, however, a defendant is only prejudiced by a failure to file an appeal if there were credible arguments to be made on

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2. The remainder of Argument II assumes for the sake of argument that the Prisoner could meet the first prong of the *Strickland* test.

appeal. At the very least, absent any showing in the record that the Prisoner had a single meritorious claim on appeal, there is no basis upon which to assume that were he competently counseled he would have filed an appeal. The fact that the Prisoner filed a late appeal on his own initiative tells us nothing about whether he would have filed one if were informed by counsel that he had no non-frivolous grounds upon which to appeal.

III.

THE *PER SE* RULES THE PRISONER PROPOSES TO OVERCOME THE ABSENCE OF PREJUDICE ARE CONTRARY TO SOUND LAW AND POLICY

Because his inadequate assistance of counsel claim fails if the *Strickland* test is applied, the Prisoner proposes that this Court adopt *per se* rules that assume prejudice. His inability to show any prejudice in his own case speaks volumes about why a *per se* ineffective assistance of counsel rule makes no sense in the context of appeals following guilty pleas. A *per se* rule only makes sense when it reaches the right result the large majority of the time. *See Strickland*, 466 U.S. at 692 (prejudice is presumed where prejudice is so likely that case-by-case inquiry is not worth the cost); *United States v. Cronic*, 466 U.S. 648, 658 (1984) (prejudice is presumed where the circumstances are so likely to have prejudiced the accused that the cost of litigating their effect in a particular case is unjustified); *cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time[]"). But if defendants who plead guilty cannot show prejudice most of the time, the proposed *per se* rules will often produce the wrong result. The Prisoner has failed to demonstrate that defendants who plead guilty would usually be prejudiced by failing to appeal. For this and the reasons discussed below, his proposed *per se* rules are insupportable.

1. The Prisoner devotes a scant three pages of his brief (Br. at 17-20) to defending the *per se* rule created by the Ninth Circuit -- that unless a defendant consents to counsel not filing an appeal following a guilty plea, a Sixth

Amendment violation will be presumed even if he never instructed counsel to file an appeal. Given the myriad practical difficulties with that rule, it is not surprising that the Prisoner directed most of his attention elsewhere. As set forth in the Warden's opening brief (Br. at 10-14, 17-20) and the amicus brief of the United States (Br. at 14-17), the Ninth Circuit's *per se* rule ignores the fact the there is nothing unusual about defendants not filing appeals following guilty pleas and there are relatively limited grounds for challenging guilty pleas and the resulting sentences. This means that there is nothing presumptively "ineffective" about a counsel's decision not to appeal a guilty plea. Moreover, the absence of consent is easy to allege and difficult to disprove, which makes the proposed *per se* rule subject to abuse, in contravention of the goals of finality and speed that underlie most plea agreements.

Finally, as discussed in the Warden's opening brief (Br. at 7-8), affirmance of the Ninth Circuit's judgment would lead to state and/or federal habeas litigation over the revival of defaulted, meritless, post-plea appeals. NACDL claims that affirmance of the Ninth Circuit's judgment would not require lower courts to grant habeas relief; instead, lower courts would merely have to hold hearings to decide whether defense counsel failed to consult with the defendant and whether the defendant consented to forgo an appeal. NACDL Br. at 21 n.15. Of course, even hearing such cases would be burdensome to the lower courts. Further, many defendants would attempt to litigate adverse rulings from such hearings. As the Warden has pointed out, if the Ninth Circuit's judgment stands, every defendant in the Ninth Circuit who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, at least if his/her case became final after *Lozada v. Deeds*, 964 F.2d 956 (CA9 1992). Litigating these cases, especially since they require evidentiary hearings, would

indeed be burdensome to the states included in the Ninth Circuit. Moreover, most of the resulting requests for certificates of probable cause (generally required for post-plea state court appeals in California) and subsequent appeals will be meritless as they will have arisen out of guilty pleas. At the very least, if this Court adopts the rule the Prisoner seeks, this Court should state that it is announcing a "new rule" which will not be applied retroactively.[3]

2. The Prisoner devotes most of his argument to creating and defending an alternative *per se* rule: that a criminal defendant who pleads guilty is automatically entitled to a new appeal if defense counsel failed to advise him about the right to appeal. Resp. Br. at 7-17, 19-24. This *per se* rule, too, is contrary to logic and most lower court opinions. *See* Petr. Br. at 9-14, 17-20; U.S. Br. at 21-25. It is not the Warden's position that counsel *never* has the duty to advise a defendant who pled guilty about his appeal rights. As stated in the opening brief, the Warden agrees with the Ninth Circuit's holding in *Marrow v. United States*, 772 F.2d at 528:

> We conclude that there is no duty in all cases to advise of the right to appeal a conviction after a guilty plea. Rather, counsel is obligated to give such advice only when the defendant inquires about appeal right or when there are circumstances present that indicate that

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3. CJLF correctly notes that the result the Prisoner seeks is barred by *Teague v. Lane*, 489 U.S. 288 (1989). CJLF Br. at 18-20. This argument is not foreclosed by the denial of certiorari on Question 1 of the Warden's certiorari petition. CJLF Br. at 18. In attempting to rebut CJLF's *Teague* argument, the Prisoner cites case law for propositions far too general too establish that his proposed rule was "dictated by precedent." Resp. Br. at 22-23 n.14; *cf. Sawyer v. Smith*, 497 U.S. 227, 236 (1990) ("clearly established law" test is not to be applied in an overly general manner).

defendant may benefit from receiving such advice.

Numerous other federal courts of appeal and state supreme courts have held the same.[4] There is therefore no merit to the NACDL's contention (Br. at 19) that no jurist takes the position that it is not part of counsel's function to discuss the pros and cons of appeal with the client.

There are myriad reasons why it is reasonable for counsel to assume that a defendant who pled guilty does not wish to appeal and why, therefore, there is no recognized constitutional right to advice regarding appeals following guilty pleas. Among them are:

- A guilty plea waives numerous appellate issues, *see* Petr. Br. at 10-14, and sentencing issues are almost always addressed in the negotiation or structuring of the plea. *See* U.S. Br. at 16. As a consequence, there will often be no non-frivolous issues to appeal (unlike the situation following convictions by trial).
- As noted in *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 466 U.S. at 691. By pleading guilty, a defendant generally manifests a desire to terminate the litigation.
- More specifically, a defendant demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for rehabilitation in a shorter time period than would otherwise be necessary. *See Brady v.*

4. *See Hardiman v. Reynolds*, 971 F.2d 500, 506 (CA10 1992); *Laycock v. New Mexico*, 880 F.2d 1184, 1187-88 (CA10 1989); *Carey v. Leverette*, 605 F.2d 745, 746 (CA4 1979), *cert. denied* 444 U.S. 983 (1979); *Langford v. State*, 531 So.2d 944, 944 (Ala. Crim. App. 1988); *State v. Miller*, 278 Mont. 231, 234, 924 P.2d 690, 691 (Mont. 1996); *Thomas v. State*, 979 P.2d 222, 223 (Nev. 1999); *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (S.C. 1995).

United States, 397 U.S. 742, 753 (1970), *cited at* Petr. Br. at 13.

- Even in those cases where the defendant pleads guilty without actually admitting his guilt, the guilty plea usually indicates a desire to avoid the risk of greater punishment. As the Prisoner and his amicus note, an appeal can expose the defendant to the possibility of a more severe sentence. Resp. Br. at 16-17 n.10; NACDL Br. at 15. That works against their position. As a general rule it is reasonable for an attorney to conclude that his risk-averse client, who has just opted for the security of a plea bargain, does not wish to forfeit that security and take his chances on appeal.
- Post-plea advice as to appellate remedies will merely tend to build false hopes and encourage frivolous appeals, with the resulting expense to taxpayers. *See* Petr. Br. at 18 (citing *Marrow*, 772 F.2d at 528 and notes of the Advisory Committee on the Federal Rules of Criminal Procedure).

The defendant received the benefit of his attorney's advice prior to the entry of the plea. Indeed, it is because of the attorney's advice that the defendant has pleaded guilty, largely foreclosing appeal. Thus, there is no reason to create an absolute duty by counsel to advise of appeal rights after a guilty plea. In fact, by entering the plea, the defendant has demonstrated that he intelligently understands what he is doing and the consequences of his plea.

Thus, although there may be instances in which counsel will have a duty to advise the defendant of appeal rights after a guilty plea, such instances will be limited. Neither litigation realities nor the authorities support the creation of an absolute duty by counsel to advise of appeal rights after all guilty pleas. The Prisoner audaciously claims that it is speculative to suggest that when a defendant pleads guilty he manifests a desire to end the litigation. Resp. Br. at 17. But as the party

seeking to create a new *per se* rule, the burden is on the Prisoner to demonstrate the converse: that defendants pleading guilty generally wish to continue pursuing the litigation. This he cannot do, for certainly, with few exceptions, the defendant who pleads guilty seeks to avoid the risk of further litigation.[5] Whether plea agreements sometimes reserve appeal rights (as the Prisoner asserts at 17) is irrelevant. Such reservations tell us nothing about how often appeals following guilty pleas are filed and the general mindset of defendants who plead guilty.[6]

In most guilty plea cases there are no grounds for appeal. Hence, there is no reason to establish a constitutional presumption of ineffective assistance where no appeal is filed.

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5. The Warden acknowledges that there may be exceptional circumstances in which a defendant pleads guilty but nevertheless wishes to pursue an appeal. For example, if a defendant's suppression motion is denied, he may plead guilty with the intention of litigating the matter on appeal. Cal. Penal Code § 1538.5(m). Indeed, such an appeal may be part of the plea bargain. This is not the case here.

6. In the present case, despite whatever conversation may have occurred between the Prisoner and trial counsel (Petr. Br. at 5; J.A. 133), the Prisoner failed to request an appeal. Petr. Br. at 15-16.

IV.

JUDICIAL ADVISEMENTS OF APPEAL RIGHTS SHOULD PROMPT A REASONABLE DEFENDANT TO ASK ABOUT APPEAL

The Prisoner and NACDL complain that a judicial advisement of appeal rights is not sufficient for a defendant to make an informed decision about whether to appeal. Resp. Br. at 9; NACDL Br. at 23. However, a judicial advisement of appeal rights should prompt a reasonable defendant, if interested in appealing, to ask his attorney about an appeal. Indeed, it is hard to think of any other purpose for the advisement. Upon inquiry by the defendant, the attorney would then have a duty to advise the defendant concerning appeal. *See e.g., Marrow*, 772 F.2d at 528.

The Prisoner speculates that the right to appeal is not a matter of common knowledge. Resp. Br. at 8. The Warden submits that the right to appeal is likely to be a matter of common knowledge among criminal defendants. Petr. Br. at 15, citing *Castellanos v. United States*, 26 F.3d 717, 719 (CA7 1994). It is reasonable to assume that defendants have knowledge of the right to appeal from the widespread public awareness of the right to appeal, stemming from, inter alia, innumerable media reports on criminal cases and judicial opinions, their prior experiences with the criminal justice system, or the experiences of other criminal acquaintances.

Where there has been judicial advice of the right to appeal, there is no reason to presume ineffective assistance of counsel where no notice of appeal is filed after a guilty plea. This is especially true where defendants are given a substantial amount of time to file a notice of appeal. California Rules of Court, Rule 31(a), (d) (sixty days to file).

In Appendix A to the Brief for Respondent, the Prisoner provides a list of states in which judicial advisement of appeal rights is not required following a guilty plea. That many states do not advise defendants of post-plea appeal rights merely underscores the fact that post-plea appeals are uncommon (at least compared to post-trial appeals) and post-plea appeals are disfavored (probably because they are likely to be meritless). Further, post-plea appeals are contrary to the policy of allowing pleas as an early end to litigation.

That many states disfavor post-plea appeals also highlights an important federalism concern. Such states have a policy disfavoring post-plea appeals for the sound reason that such appeals generally consume scarce judicial resources with meritless claims. It is reasonable for a state to conclude that this waste of judicial resources is to be discouraged; this Court should respect that decision. *Cf. Johnson v. Fankell*, 520 U.S. 911, 923 n.13 (1997) (it is a matter for each state to decide how to structure its judicial system); *McKane*, 153 U.S. at 688 (whether an appeal should be allowed, and, if so, under what circumstances, are matters for each state to determine).

Moreover, the Prisoner's statistics on the success rate of post-plea appeals (Br. at 15) do not take account of post-plea appeals that are weeded out by the denial of a certificate of probable cause. In California, a certificate of probable cause is a prerequisite to a post-plea appeal affecting issues of actual guilt or innocence. Cal. Penal Code § 1237.5; Cal. Rules of Court, Rule 31(d). Further, California's certificate of probable cause procedure reflects a reasonable legislative determination that most post-plea appeals are meritless.

V.

THE PRISONER AND NACDL FAIL TO DISTINGUISH BETWEEN POST-TRIAL APPEALS AND POST-GUILTY PLEA APPEALS

Virtually all of the authorities cited by the Prisoner and NACDL are distinguishable because they involve appeals from convictions by trial, not guilty pleas. As noted, a guilty plea manifests a desire to accept responsibility or to terminate the litigation.

The Prisoner cites a number of circuit court cases to support his assertion that the Sixth Amendment mandates competent advice and consultation regarding the right to appeal. Resp. Br. at 10. All of these cases are distinguishable because they involve appeals from convictions by trial. Resp. Br. at 10; *see also* NACDL Br. at 12 (text), 18. The Prisoner claims that where the defendant has not communicated to his attorney his decision on whether to appeal, counsel must preserve the defendant's right to appeal. Resp. Br. at 19. However, all but one of the cases the Prisoner relies on for this proposition involve convictions by trial.[7] Even most of the cases the Prisoner cites for more general propositions involve convictions by trial, not guilty pleas. *See e.g.*, Resp. Br. at 8-9, 19-20.[8] Many other cases cited by NACDL are trial cases. *See* NACDL Br. at 13, 14, 18.

Other authorities cited by the Prisoner and NACDL are likewise inapposite. The cited American Bar

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7. *United States v. Stearns*, 68 F.3d 328 (CA9 1995) the only plea case, was wrongly decided. Petr. Br. at 9-27.

8. *Estes v. United States*, 883 F.2d 645, 649 (CA8 1989) is a plea case but involves a purported request for appeal. *Hill v. Lockhart*, 474 U.S. 52, 54-55, 60 (1989) is a plea case but does not concern counsel's post-plea duties as to appeal.

Association ("ABA") standard fails to distinguish between post-plea appeals and post-trial appeals. Resp. Br. at 12; NACDL Br. at 18-19 n.13. The better approach is the older and wiser ABA standard which sensibly limited the trial court's duty to advise of appeal rights to "contested cases." Petr. Br. at 18, quoting *Marrow*, 772 F.2d at 528. Further, another ABA standard states that a court should not accept a guilty plea unless the defendant understands that by pleading guilty he is largely waiving his right to appeal. ABA Standards for Criminal Justice, Standard 14-1.4(a)(vi) (3d ed. 1997). Finally, the fact that the ABA has recognized a given practice as desirable does not mean that the practice is required by the Constitution. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983); *see also Strickland*, 466 U.S. at 688-89 (no set of rules, including the ABA rules, can take account of the range of legitimate attorney decisions).

The Prisoner also cites the Restatement as to a lawyer's duty to consult with his client. Resp. Br. at 13, 18. This generalized standard does not necessarily apply to criminal appeals and certainly does not shed any light on the specific situation of advice following a guilty plea. Arguably, an attorney meets the standard by consulting with the client prior to the plea. Further, the Prisoner and NACDL misinterpret California Penal Code § 1240.1(a). Resp. Br. at 12-13 n.5; NACDL Br. at 19. It is clear from the language of § 1240.1(a) that counsel has a duty to advise about appeal rights only where counsel represented the defendant "at trial." Petr. Br. at 23. The introductory language of § 1240.1(a), making that section applicable to any noncapital criminal case where the defendant would be entitled to appointment of counsel on appeal, limits the section to trial cases which are noncapital and involve indigent defendants.

CONCLUSION

Accordingly, the Warden asks that this Court reverse the judgment of the Ninth Circuit.

Dated: September 2, 1999.

Respectfully submitted,

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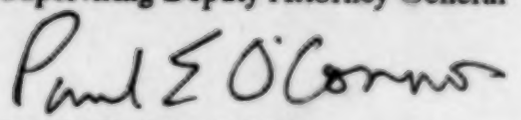

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No. 98-1441

In the Supreme Court of the United States

ERNEST C. ROE, WARDEN, PETITIONER

v.

LUCIO FLORES ORTEGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant, particularly where the defendant has been advised of his appeal rights.

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INTEREST OF THE UNITED STATES

This case involves the proper standards for evaluating a claim that respondent's constitutional right to counsel was violated when his lawyer failed to perfect an appeal from the state court judgment entered on his plea of guilty. Because similar collateral attacks on federal criminal judgments will generally be adjudicated under the same standards, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. In 1993, respondent Ortega stabbed and killed an innocent bystander during a barroom confrontation with another man. See J.A. 34-36. Earlier the same day, respondent had chased the victim around a local park, brandishing a knife, after an apparently unrelated

dispute. That evening he had committed another armed assault, lunging with his knife at the man he later confronted again in the bar. J.A. 34-35, 37-38.

The State of California charged respondent with murder and two counts of assault. J.A. 152. It also sought a sentence enhancement on the murder count for personal use of a deadly weapon. *Ibid.* After consulting with counsel, respondent entered into a plea agreement under which he pleaded guilty to second-degree murder, and the State moved to dismiss the two assault charges and to strike its request for a deadly-weapon enhancement. J.A. 152-153.[1] At a sentencing hearing on November 10, 1993, respondent's counsel asked the state court to place respondent on probation, but the court rejected that request. J.A. 35-36, 40; see Cal. Penal Code § 1203(e)(2) (West Supp. 1999) (prohibiting probation, except in "unusual cases," where the offender "used * * * a deadly weapon upon a human being" in connection with the offense of conviction); Cal R. Ct. 413(c) (West 1996) (specifying factors to be considered in determining whether a case is "unusual"). The court instead sentenced respondent to the term of 15 years to life in prison prescribed by state law for second-degree murder. J.A. 40.[2]

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[1] The plea was entered under a state procedure that allows the accused to admit that the State has sufficient evidence to convict him, without actually admitting commission of the crime. See J.A. 153.

[2] At the time of respondent's offense, state law required the imposition of a term of 15 years to life for any second-degree murder that did not involve specified aggravating factors. Cal. Penal Code § 190(a) (West 1999) (version in effect before 1993 and later amendments; see Historical and Statutory Notes at pp. 181-183). First-degree murder was punishable by death (subject to compliance with various other provisions) or by a term of 25 years to life in prison. *Ibid.* Although the applicable minimum term was subject to reduction by "good time" credits, a convicted offender was not otherwise eligible for release on parole during that term. See generally Cal. Penal Code §§ 5075 *et seq.* (West 1982) (relating to Board of Prison Terms, which passes on applications for release on parole at any point before expiration of maximum term of indeterminate sentence). With regard to the charges dismissed under the plea agreement, assault with a deadly weapon was punishable by up to four years' imprisonment, while the deadly weapon enhancement would have added a consecutive one-year term to the sentence otherwise imposed on the murder count. Cal. Penal Code § 245(a)(1) (West 1999); § 12022(b) (West Supp. 1999).

No notice of appeal from respondent's conviction or sentence was filed within the 60 days allowed by state law. J.A. 152; see Cal. Penal Code § 1239(a) (West Supp. 1999); Cal. R. Ct. 31(d) (West 1996).[3] In March 1994 respondent attempted to file a notice of appeal challenging his conviction, stating that his lawyer had "misrepresented [the] * * * ramifications of pleading guilty" by telling him that he "would only get 3 1/2 years if [he] pleaded guilty," and that if he had not been "misled" by counsel he would not have pleaded

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[3] In order to perfect an appeal concerning the validity of the conviction entered on respondent's guilty plea, respondent would have had to submit to the trial court a sworn statement showing "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and the trial court would have had to grant respondent a "certificate of probable cause" for the appeal. Cal. Penal Code § 1237.5 (West Supp. 1999). Neither requirement would have applied to an appeal challenging only respondent's sentence, or other aspects of the proceedings occurring after entry of the guilty plea. See Cal. R. Ct. 31(d) (West 1996) (*reprinted at* Pet. App. C3-C4); *People* v. *Delles*, 447 P.2d 629, 631 (Cal. 1968); see also, *e.g.*, *People* v. *Ribero*, 480 P.2d 308, 311-312 & n.3 (Cal. 1971).

guilty. C.A. E.R. 47-49. The court clerk rejected the notice as untimely. *Id.* at 57; J.A. 152-153.[4]

Respondent sought relief from the state court of appeal, filing both a petition for a writ of habeas corpus and a motion for leave to file a belated notice of appeal. See C.A. E.R. 59-62; J.A. 43. He repeated his claim that he had been misinformed about the consequences of pleading guilty, and added a claim that his attorney had not "[told him] about any time limitations for appeal." C.A. E.R. 60. The court of appeal noted that it had discretion to forgive a default in the timely filing of a notice of appeal, that its power in that regard was to be "liberally exercised," and that "reasonable doubts" were to be "resolved in favor of the petitioner in order to protect the right of appeal." J.A. 43-44. It further observed, however, that the transcripts of proceedings in the trial court "ma[de] clear pertinent facts," including that respondent's change of plea occurred "during trial" and "almost one month prior to sentencing"; that the court informed respondent, with an interpreter present, of the sentencing consequences of a guilty plea, as did the post-plea probation report; and that at sentencing, again with an interpreter present, respondent "expressed no surprise or objection to the term imposed." J.A. 44. Under those circumstances, the court refused to issue a writ of habeas corpus. *Ibid.*

Respondent also sought a writ of habeas corpus from the California Supreme Court, repeating and elaborating on his previous challenges both to the validity of his plea and conviction and to the refusal to entertain his appeal. C.A. E.R. 68-76. That petition added, for the

[4] It appears that respondent also attempted to file a motion to withdraw his guilty plea, alleging similar grounds. C.A. E.R. 50-54.

first time, an allegation that respondent's attorney had not filed a timely notice of appeal "as she promi[s]ed." *Id.* at 70, 76. The state Supreme Court denied the petition without comment. J.A. 45.

2. After the state courts denied him relief, petitioner commenced this action in federal district court under 28 U.S.C. 2254 (1994 & Supp. III 1997), alleging only that his federal constitutional right to counsel was violated by trial counsel's "fail[ure] to file a notice of appeal on his behalf after promising to do so." J.A. 46, 51, 152-153. The district court referred the matter to a magistrate, who appointed counsel to represent respondent at an evidentiary hearing limited to determining "the credibility of [respondent's] assertions that [his lawyer] promised to file a notice of appeal on his behalf." J.A. 92, 153 (emphasis omitted).

At the hearing, the magistrate received testimony from respondent, his trial counsel, and the state-certified Spanish-language interpreter who had served both at the change-of-plea hearing and at sentencing. J.A. 154. Trial counsel testified that on the day before sentencing she met with respondent and an interpreter to review with him the pre-sentence report prepared by the state probation office. Br. in Opp. 1-2; see J.A. 109. At some point she wrote on that report the notation "bring appeal papers," as "a reminder to take appeal papers to court with her at sentencing." Br. in Opp. 2; see J.A. 109-110. She also testified that, in her opinion, the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation; that such an appeal would "almost certainly [have] fail[ed]"; and that, although she would not have encouraged an appeal, she would have filed one had respondent asked her to do so. J.A. 158; see J.A. 114-115, 119-120.

After hearing the evidence, the magistrate concluded that respondent had had "little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game." J.A. 133, 154. He found that respondent "did not consent to [counsel's] failure to file a notice of appeal," but also that respondent had "not met his burden of proving by a preponderance of the evidence that [counsel] had promised to file a notice of appeal on his behalf." J.A. 132-133, 154. Moreover, he concluded, respondent's lawyer was "obviously an extremely experienced defense counsel" and "a very meticulous person," so that "had [respondent] requested that she file a notice of appeal, she would have done so." J.A. 133.

The magistrate recognized that his finding that respondent did not consent to the failure to appeal would be sufficient to require relief under the Ninth Circuit's decision in *United States* v. *Stearns*, 68 F.3d 328 (1995). He held, however, that by dispensing with any requirement that a habeas petitioner show that he had asked his attorney to file a notice of appeal (or that she was otherwise under an affirmative duty to do so), *Stearns* had stated a "new rule" of federal constitutional law, which, under *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), could not be applied on federal collateral review of respondent's state conviction. J.A. 154-161. He therefore recommended that the district court deny respondent's federal habeas petition. J.A. 161. The district court, after "carefully review[ing] the entire file," including petitioner's objections to the magistrate's report, adopted the magistrate's findings and recommendations and denied relief. J.A. 162-163.

3. The court of appeals reversed. J.A. 164-169. The court reasoned that the rule it had applied in *Stearns*—that a habeas petitioner need show only "that counsel's

failure to file a notice of appeal was *without the petitioner's consent*"—had first been announced in *Lozada* v. *Deeds*, 964 F.2d 956, 958 (9th Cir. 1992), well before the time of respondent's plea and conviction. J.A. 168. Although *Lozada* involved a conviction entered after trial, rather than after a guilty plea, the court concluded that *Stearns* had merely "appli[ed] * * * the rule in *Lozada*," rather than announcing a "new rule" of law whose application to respondent's case would be barred by *Teague* v. *Lane*. *Ibid.* Because the district court's factual finding that respondent "did not consent to the failure to file a notice of appeal" in his case satisfied the sole requirement of the *Lozada/Stearns* rule, the court reversed the district court's judgment and remanded the case with instructions to issue a conditional writ of habeas corpus, "releasing [respondent] from state custody unless the state trial court vacates and reenters [respondent's] judgment of conviction and allows a fresh appeal." J.A. 166, 168.

SUMMARY OF ARGUMENT

A criminal defendant generally has a Sixth Amendment right to the effective assistance of counsel, both at trial and on direct appeal. The right extends to advice concerning whether or not to plead guilty, and to assistance in pursuing any appeal taken from the judgment entered after such a plea. Given that the nature of appeals, and the possible legal claims that might be advanced on appeal, are beyond the knowledge of most defendants, it would be anomalous if the defendant did not also have a right to assistance of counsel in understanding the appeal process and in making the decision whether to appeal. Respondent's right to counsel accordingly included a right to consult with a lawyer concerning the possibility and advisabil-

ity of pursuing an appeal from his conviction or sentence.

Respondent now contends that, had he been adequately represented, he would have perfected such an appeal. The court of appeals held that even if respondent never specifically instructed his lawyer to appeal, he was entitled to a new opportunity to appeal because he did not give his consent to his lawyer's failure to file a notice of appeal within the 60 days allowed by state law. That "consent" rule should be rejected, because it seriously undervalues the substantial public interest in the finality of criminal judgments, is in considerable tension with this Court's decisions, and is subject to abuse.

There are, nonetheless, circumstances under which a claim of ineffective assistance in taking an appeal may be made out. Where the defendant can prove that he instructed his lawyer to appeal but the lawyer failed to do so, the case for professional error is straightforward, and prejudice to the defendant may properly be presumed. The problem is more difficult where, as in this case, the defendant cannot make such a showing. In those circumstances, a court should accord the defendant a new opportunity to appeal only if he can demonstrate both (i) that, on the particular facts of his case, his lawyer's performance fell outside the potentially wide range of competent professional approaches to the question of counseling about an appeal from a conviction based on a guilty plea, and (ii) that there is a reasonable probability that, but for counsel's unprofessional errors, he would have directed his attorney to perfect an appeal. That standard will not require a conclusive determination, on collateral review, of the merits of the underlying claims the defendant seeks to present on appeal. It will, however, require a sufficient

showing of prejudice in the decision whether or not to appeal to provide some level of confidence that a court granting collateral relief is remedying a true violation of the defendant's right to counsel.

In this case, respondent cannot show that his lawyer failed to execute an actual instruction to appeal. Nor does the present record afford any sound basis for concluding that respondent's failure to appeal resulted from a decision, assumption, or error on the part of his counsel falling outside the normal range of competent post-guilty-plea representation, or that there is a reasonable probability that, if competently counseled, respondent would have directed his attorney to appeal. That record is accordingly insufficient to support the court of appeals' judgment.

ARGUMENT

I. COLLATERAL RELIEF SHOULD BE GRANTED TO RESTORE A FORFEITED FIRST APPEAL ONLY IF THE APPLICANT CAN SHOW NOT ONLY THAT COUNSEL PROVIDED PROFESSIONALLY INADEQUATE ASSISTANCE, BUT ALSO THAT THERE IS A REASONABLE PROBABILITY HE WOULD HAVE TAKEN THE APPEAL BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS

A. The Right To Counsel Includes A Right To Appropriate Consultation Regarding Appeal After A Guilty Plea

The Constitution guarantees the accused "[i]n all criminal prosecutions" the right to effective assistance of legal counsel at every critical stage of trial-level proceedings, from the filing of charges or other commencement of adversary judicial proceedings through acquittal or conviction. U.S. Const. Amend. VI; *United*

States v. *Gouveia*, 467 U.S. 180, 187-189 (1984); *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984); cf. *Nichols* v. *United States*, 511 U.S. 738, 743 & n.9 (1994) (right to appointed counsel for indigent defendants applies to all felony cases and to misdemeanors where actual imprisonment is imposed). The guarantee extends to the effective assistance of counsel in pursuing one direct appeal, where applicable law provides the opportunity for such an appeal as a matter of right. *Evitts* v. *Lucey*, 469 U.S. 387 (1985); see also, *e.g.*, *Penson* v. *Ohio*, 488 U.S. 75 (1988); *Anders* v. *California*, 386 U.S. 738 (1967). One aspect of effective legal assistance on appeal is compliance with the particular procedures and deadlines necessary, in the relevant jurisdiction, to effectuate the client's decision to appeal. *Evitts*, *supra*; see *Coleman* v. *Thompson*, 501 U.S. 722, 752-757 (1991) (distinguishing situations in which there is a constitutional right to effective assistance of counsel from those in which there is no such right).[5] Moreover, where a defendant asks counsel to perfect an appeal and counsel fails to do so, this Court and others have generally held that no other or more specific prejudice need be shown in order to justify relief. *Rodriquez* v. *United States*, 395 U.S. 327 (1969); see also *Peguero* v. *United States*, 119 S. Ct. 961, 965 (1999) (discussing *Rodriquez*); *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam).[6]

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[5] See also, *e.g.*, *Restrepo* v. *Kelly*, No. 97-2944, 1999 WL 346164 (2d Cir. June 2, 1999); *Ludwig* v. *United States*, 162 F.3d 456, 459 (6th Cir. 1998) (collecting cases); *United States* v. *Guerra*, 94 F.3d 989, 994 (5th Cir. 1996); *United States* v. *Peak*, 992 F.2d 39, 41-42 (4th Cir. 1993).

[6] See also, *e.g.*, *Restrepo*, 1999 WL 346164, at *8-*9; *McHale* v. *United States*, 175 F.3d 115, 116-118 (2d Cir. 1999); *Ludwig*, 162 F.3d at 459; *Guerra*, 94 F.3d at 994; *Castellanos* v. *United States*, 26 F.3d 717, 718-720 (7th Cir. 1994); *Peak*, 992 F.2d at 41-42; *Lozada* v. *Deeds*, 964 F.2d 956, 958 (9th Cir. 1992); *Bonneau* v. *United States*, 961 F.2d 17 (1st Cir. 1992); *Abels* v. *Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990); *Estes* v. *United States*, 883 F.2d 645, 649 (8th Cir. 1989).

A defendant's right to counsel extends to advice concerning whether or not to plead guilty to the charges pending against him. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985); *Mabry* v. *Johnson*, 467 U.S. 504, 508-510 & n.10 (1984); *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973); *McMann* v. *Richardson*, 397 U.S. 759, 769-771 & n.14 (1970). Moreover, even after having pleaded guilty, the defendant may have colorable grounds to appeal—to challenge the sentence imposed by the court, for example, or an unfavorable evidentiary ruling that led to a conditional plea, or (in a few cases) the validity of the plea itself. See 18 U.S.C. 3742(a); Fed. R. Crim. P. 11(a)(2), 32(c)(5). The right to counsel also extends to pursuing any such claims on a first appeal as of right.

While the decision whether to appeal belongs to the defendant personally, see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), it is unrealistic to expect a defendant to comprehend the appellate process or its potential benefits, detriments, and limitations without the advice of counsel. To an even greater degree than trials, appeals turn on the nature of the governing law and such technicalities as standards of review. The appellate process itself is also likely to be foreign to most defendants. The decision whether to appeal cannot, accordingly, be made intelligently without appropriate access to a lawyer. It would be anomalous if the right to counsel that applies at the guilty-plea stage and to representation on appeal did not also include assistance

in understanding the appeal process, evaluating the strength or weakness of potential claims, and otherwise making an informed decision about whether or not to appeal in the first place. See *Nelson* v. *Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (right to counsel is "required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated"), cert. denied, 397 U.S. 1007 (1970).

Respondent's right to counsel accordingly included the right to consult with a lawyer, at or around the time that judgment was entered against him, concerning the possibility and advisability of pursuing an appeal from his conviction or sentence. See *Baker* v. *Kaiser*, 929 F.2d 1495, 1498-1500 (10th Cir. 1991) (discussing role of counsel in period allowed for filing appeal); *Hardiman* v. *Reynolds*, 971 F.2d 500, 505-506 (10th Cir. 1992) (noting special limitations applicable in context of guilty pleas, but remanding for application of *Baker* where defendant alleged inadequate post-plea counseling); *Marrow* v. *United States*, 772 F.2d 525, 527-530 (9th Cir. 1985) (similar).[7]

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[7] This analysis of the constitutional right to counsel is consistent with the duties imposed on counsel by California law, and with guidelines for counsel published by the American Bar Association. See Cal. Penal Code § 1240.1(a) (West Supp. 1999) ("[I]t shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal."); American Bar Ass'n, *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 4.82 (3d ed. 1993) ("After conviction, defense counsel should * * * give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal * * * [and] explain * * * the advantages and disadvantages of an appeal.").

B. A Rule That Presumes Ineffective Assistance Of Counsel From Failure To Appeal After A Guilty Plea Undervalues The Public Interest In Finality And Is Subject To Abuse

Respondent entered into a plea agreement with state prosecutors, under which he pleaded guilty to a charge of second-degree murder. He now contends that, had he been adequately counseled, he would have perfected an appeal challenging his conviction, his sentence, or both. See, *e.g.*, Br. in Opp. 9; J.A. 57-59 (portion of federal habeas petition); C.A. E.R. 47 (original untimely notice of appeal, noting challenge both to sentence and to validity of plea). In addressing that claim, the court of appeals did not evaluate the adequacy of the counseling that respondent received on the presence or absence of any arguable basis for appeal. Nor did the court consider whether respondent had instructed his lawyer to appeal on his behalf, after having been advised of that right by the trial court. Rather, the court held that respondent's simple ability to show that he "did not consent to counsel's failure to file" an appeal within the 60-day period allowed by the State after the entry of judgment sufficed to require the issuance of a federal writ of habeas corpus setting aside respondent's state conviction, unless the state trial court reentered its judgment so as to re-start the time for taking a direct appeal. J.A. 166, 168; see Cal. R. Ct. 31(d) (West 1996) (*reprinted at* Pet. App. C3-C4) (time limit for appeal following guilty plea). That approach incorrectly equates failure to file a notice of appeal, without explicit consent from the defendant, with constitutionally ineffective assistance of counsel.

The court of appeals' rule effectively requires a federal court to grant collateral relief upon a simple allegation of non-consent, unless the record affirmatively discloses, or the prosecuting government can show, that the defendant deliberately bypassed his right to take a direct appeal from the judgment entered on his guilty plea. See, *e.g.*, *Salmon* v. *Carrillo*, No. 96-55707, 1998 WL 792290 (9th Cir. Nov. 13, 1998) (per curiam) (unpublished summary order granting "automatic[] * * * [conditional] reversal" of state conviction where defendant "did not consent to the abandonment of his appeal"), petition for cert. pending, No. 98-1473; Br. in Opp. 5 (relying on *Fay* v. *Noia*, 372 U.S. 391 (1963)). Indeed, it would create a situation in which almost any guilty plea would have to be understood to contain an unwritten reservation of an opportunity to take one "direct" appeal at some later time, regardless of normal deadlines or procedural requirements. Such a rule seriously undervalues the respect owed to state (and federal) procedural rules, and the substantial public interest in the finality of criminal judgments. It is also in considerable tension with this Court's decisions rejecting the "deliberate bypass" standard for assessing a federal court's ability to grant collateral review of procedurally defaulted claims, including those in which the default consists of a failure to take any direct appeal. See *Coleman* v. *Thompson*, 501 U.S. at 744-751 (rejecting use of *Fay* standard in this context); see also, *e.g.*, *Murray* v. *Carrier*, 477 U.S. 478, 485-492 (1986); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

A defendant who claims a violation of his right to counsel based on his lawyer's failure to provide effective assistance in bringing a first appeal must bear

the usual burden of proving that the assistance he received was constitutionally deficient. Normally, that requirement entails a two-part showing: first, that counsel's performance was so seriously lacking in some particular respect as to fall below an objective standard of reasonableness; and second, that the defendant suffered some actual prejudice because of that inadequate performance. *Strickland*, 466 U.S. at 687; *Kimmelman* v. *Morrison*, 477 U.S. 365, 381 (1986); *Hill*, 474 U.S. at 58-59. To show deficient performance under the first step of this analysis, the defendant must overcome "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689-690.

That presumption has particular application when a defendant claims that ineffective assistance resulted in his failure to pursue an appeal after pleading guilty. Because guilty pleas account for a large proportion of criminal convictions, proposed rules that undermine the finality of the resulting judgments are properly disfavored. See, *e.g.*, *Hill*, 474 U.S. at 58 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (in turn quoting *United States* v. *Smith*, 440 F.2d 521, 528-529 (7th Cir. 1971) (Stevens, J., dissenting))); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Moreover, because there is nothing unusual about a defendant's failure to appeal after having pleaded guilty, such a failure by itself gives no hint of ineffective legal assistance. See *State* v. *Peppers*, 796 P.2d 614, 619-620 (N.M. Ct. App. 1990) (distinguishing guilty-plea cases from those involving failure to appeal from conviction after trial). To the contrary, once an unconditional guilty plea has been properly accepted by the court, the grounds available for challenging the resulting conviction itself are narrow. See, *e.g.*, *Tollett*, 411 U.S. at 267. Although a

defendant may have other possible grounds for appeal, such as a challenge to the sentence imposed by the court, those issues will often have been addressed in the negotiation or structuring of the plea (or even included in the plea agreement itself), and the defendant will have decided, with the advice of counsel, to accept a final resolution of the accusations against him. Thus, there is ordinarily nothing remarkable about a defendant's choosing not to pursue legal challenges further. In addition, the core concern "that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784.

There is also a special need for caution in this context because any opportunity to revisit, on collateral review, an initial failure to appeal from a judgment based on a guilty plea may present potential habeas petitioners with unusual temptations for abuse. Defendants who have made difficult decisions to plead guilty, often choosing among unpleasant options under conditions of inevitable legal uncertainty, may simply have second thoughts after the normal time for appeal has run. Compare *McMann*, 397 U.S. at 769-771; *Brady* v. *United States*, 397 U.S. 742, 756-758 (1970). Moreover, new rules of law may be announced that, while unavailable to the defendant on collateral review, could be invoked on a new or reinstated "direct" appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621-624 (1998); *Teague* v. *Lane*, 489 U.S. 288, 305-310 (1989) (plurality opinion).

Where such benefits may be sought on the basis of asserted representational errors that are beyond the prosecutor's ability to prevent, easy for the defendant to allege, and often difficult to disprove (given the potential absence of reliable records of private consultations between a defendant and his lawyer), the prosecuting government, and the public it represents, may be deprived of a significant part of the proper benefits of its plea agreement with the defendant. Those benefits include not only the avoidance of trial, but also expedition, finality, and repose. See, *e.g.*, *Hill*, *supra*; *Blackledge*, *supra*; *Timmreck*, *supra*. Courts evaluating claims like respondent's should, therefore, pay particular heed to this Court's admonitions that the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The rule applied by the court of appeals in this case is inconsistent with those requirements.

C. Relief Should Be Granted If (But Only If) A Defendant Can Show Both Inadequate Performance By Counsel And Resulting Prejudice, Either Actual Or Presumed

1. *Appeals defaulted after a request by the defendant.* While the court of appeals' approach is deficient, there are certainly circumstances under which a claim of ineffective assistance in perfecting an appeal may be made out. The most obvious of these is where the defendant can prove that he directed his lawyer to perfect an appeal, but the lawyer failed to do so. In that situation, the client has made a decision that is his to make, see *Jones*, 463 U.S. at 751, and the lawyer has been given a task that involves technical knowledge and attention, but little or no exercise of professional judgment. Compare *id.* at 751-754 (in briefing and arguing appeal, counsel exercises independent legal

judgment). There will, indeed, seldom (if ever) be any adequate professional excuse for a lawyer's failure to take the technical steps necessary to perfect an appeal when the defendant has clearly communicated a decision to appeal.[8] Every court that has addressed the question, including this Court, has accordingly recognized that an attorney's failure to act under those circumstances amounts to ineffective assistance of counsel that justifies reinstatement of the defendant's direct appeal. See *Rodriquez*, *supra*; see also *Peguero*, 119 S. Ct. at 965 (discussing *Rodriquez*); *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719-720; and other cases cited in notes 5-6, *supra*.

The courts of appeals that have considered this situation have also held that a defendant who can show that he asked his attorney to appeal, and that the attorney failed to do so, need show no other "prejudice" to warrant collateral relief that will allow the original appeal to proceed. See cases cited in note 6, *supra*; see also *Strickland*, 466 U.S. at 692 ("In certain Sixth Amendment contexts, prejudice is presumed."); *Penson*, 488 U.S. at 85-89 (no showing of prejudice required where state appellate procedures deprived petitioner of effective assistance of counsel on appeal); cf. *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam).[9] That conclusion makes sense when the

[8] If counsel believes that all possible grounds for appeal are frivolous, she may follow the course prescribed by this Court in *Anders*, 386 U.S. at 744-745. See also *Penson*, 488 U.S. at 80-82.

[9] The analysis of whether prejudice must be shown (or presumed) and what the nature of the prejudice must be arises under *Strickland* itself. The constitutional claim a defendant in this type of case presents on habeas is that ineffective assistance of counsel deprived him of his right to a first, counseled appeal. That Sixth Amendment claim was not defaulted by the very failure to

defendant has already demonstrated that he made the decision to appeal and directed his lawyer to effectuate it. In such a case, there is no question that the defendant expressed a desire to appeal within the time allowed for that decision. It is also beyond dispute that, but for counsel's inadequate performance, the appeal would have been procedurally perfected, and the defendant would have been entitled to consideration of his claims by an appellate court (and to the assistance of counsel in identifying and presenting those claims). Concerns about finality are accordingly muted, and those about strategic behavior on the part of the defendant are essentially eliminated. Indeed, such a defendant has shown that he was, in effect, deprived of the benefit of *any* counsel on appeal—a circumstance that *Strickland* itself recognized as sufficient to support a presumption of prejudice. See *Strickland*, 466 U.S. at

appeal of which the defendant complains. Cf. *Kimmelman*, 477 U.S. at 374 n.1 (distinguishing between Sixth Amendment claim and the underlying right forfeited through counsel's ineffective assistance); *id.* at 393 n.1 (Powell, J., concurring) (same). Nevertheless, it would make no difference if the defendant's claim were thought of as simply denial of a direct appeal, as to which the procedural default (failing to file a timely notice of appeal) might be excused by ineffective assistance of counsel. The requirement, under *Coleman* and like cases, that a habeas petitioner show both "cause" for and "prejudice" from not having raised on direct appeal a claim later presented for collateral review, and the *Strickland* requirement that attorney errors be prejudicial, rather than merely unprofessional, before they will amount to a violation of the constitutional right to counsel, establish parallel standards in this context, where the fundamental claim is that ineffective assistance resulted in the loss of the opportunity for a direct appeal. Compare *Strickler* v. *Greene*, No. 98-5864 (June 17, 1999) ("In this case, cause and prejudice parallel two of the three components of the alleged [constitutional] violation itself.").

692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); *Penson*, 488 U.S. at 88.

2. *Appeals defaulted in the absence of any request by the defendant.* The problem is more difficult where, as in this case, an applicant for collateral relief cannot show that he actually directed his lawyer to perfect an appeal. In such a situation the concerns about finality and possible abuse outlined above are distinctly present, and it may be difficult for a district court to evaluate a defendant's claims concerning the effectiveness of counsel's assistance on the question of appeal. Perhaps for those reasons, the relevant decisions in the courts of appeals (other than the court below) have tended to hold, or at least strongly suggest, that a defendant is not entitled to relief on the basis of his attorney's failure to perfect an appeal, unless he can show that he in fact requested that the appeal be pursued. See, *e.g.*, *Ludwig*, 162 F.3d at 459; *Castellanos*, 26 F.3d at 719-720. That bright-line rule would doubtless produce a just result in the majority of cases; and it would have, of course, the virtues common to such rules.

A bright-line rule would not, however, be consonant with the importance of the matter to the individual defendant whose right to counsel may have been violated, or with the careful contextual analysis on which this Court has typically insisted in evaluating claimed violations of a defendant's right to the effective assistance of counsel. See, *e.g.*, *Strickland*, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."); *id.* at 696 ("Most important, in adjudicating a claim of actual ineffectiveness of

counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."); cf. *McMann*, 397 U.S. at 771 ("Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts."). If, to take an extreme example, a defendant could show that the court that sentenced him had announced on the record, over counsel's objection, that it had selected a particularly harsh sentence because of the defendant's race, and that counsel subsequently advised the defendant that he had no right to relief from the sentence so imposed, it is hard to see why the defendant should be barred from relief simply because he accepted counsel's advice at face value, rather than demanding the filing of what his lawyer had advised him would be a useless appeal.

The better approach is, accordingly, to recognize that even if a defendant cannot show that counsel failed to execute a clear direction to file an appeal, the defendant may nonetheless be able to establish, in some circumstances, that counsel performed below objective standards of competency in advising him concerning the possibility and advisability of an appeal from the judgment entered after a guilty plea. Because circumstances that actually justify relief are likely to be relatively rare, however, and because the burden of litigating meritless claims is high, it is necessary in this context both to emphasize the broad range of potentially competent representation that counsel may afford on legal issues surrounding the advisability of appeal in such circumstances, and to require some showing of actual "prejudice" before awarding collateral relief.

(i) As to the first point, lower courts have recognized—and this Court should confirm—that there is no constitutional requirement that a lawyer, under all

circumstances, even advise a client who has pleaded guilty of the right to appeal from the judgment entered on that plea, much less discuss the pros and cons of such an appeal. Whether there is a duty to give such advice depends, instead, on whether the defendant seeks counsel about a possible appeal, or the lawyer knows (or should, as a matter of reasonable professional competence, know or learn) that there is some substantial ground for appeal that the defendant might wish to pursue. See *Hardiman*, 971 F.2d at 506; *Laycock* v. *New Mexico*, 880 F.2d 1184, 1187-1188 (10th Cir. 1989); *Marrow* v. *United States*, 772 F.2d at 527-530; see also *Morales* v. *United States*, 143 F.3d 94, 96-97 (2d Cir. 1998); *Castellanos*, 26 F.3d at 719 (dictum); *Giles* v. *Beto*, 437 F.2d 192, 194 (5th Cir. 1971); compare Cal. Penal Code § 1240.1(b) (West Supp. 1999) (imposing duty on lawyers representing indigent defendants to file notice of appeal "when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment * * * and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available * * * on appeal; or when directed to do so by a defendant having a right to appeal"). As the Second Circuit has observed, whether a lawyer's failure to raise the issue of appeal after a guilty plea with the defendant *sua sponte* breaches any duty to the client

> may depend on whether defendant's counsel * * * advised him [of the right to appeal] prior to sentencing * * *, or whether the court gave him notice of his appellate rights (as it should, and did here), or whether the defendant had sufficient experience with the criminal justice system to know of his right to appeal without being told—not

> to mention the variable merits and prospects of an appeal, especially one from a sentence imposed following a plea.

Morales, 143 F.3d at 96.[10]

Moreover, questions concerning the adequacy of counseling about appeal following a guilty plea will often be intertwined with questions about the details and circumstances of the plea itself, and about counsel's advice relating to acceptance of the plea.[11] Indeed, in

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[10] Largely because of the uncertainty of any harm to the client in such situations, *Morales* expressly rejected the rule that the court below applied in this case, holding instead that a claim that counsel failed to raise the issue of appeal with the defendant after a guilty plea "does not support a presumption of prejudice under *Strickland*." 143 F.3d at 96; compare *id.* at 97 (endorsing Seventh Circuit's position that "ignoring a client's request to file an appeal is ineffective assistance without regard to the probability of the appeal's success"). The Second Circuit has subsequently read its decision in *Morales* to go further, adopting the bright-line rule that "counsel is ineffective only when ignoring a defendant's explicit direction to file an appeal." *Fernandez* v. *United States*, 146 F.3d 148 (2d Cir. 1998) (per curiam). That court does not, however, require any further showing of prejudice when the defendant demonstrates that counsel ignored such a direction. See *Restrepo*, 1999 WL 346164, at *8-*9; *McHale*, 175 F.3d at 117.

[11] In this case, the primary claim respondent sought to present to the state courts appears to have been that his guilty plea was invalid because counsel misinformed him about the consequences of such a plea. See pp. 3-4, *supra*; see also J.A. 58 (federal habeas petition, asserting, in recitation of facts, that counsel coerced respondent into pleading guilty because she was unprepared for trial). As noted above (see p. 2 & note 2, *supra*), however, in exchange for respondent's plea to a second- degree murder charge, the State dropped two felony charges of assault with a deadly weapon and a proposed sentence enhancement for use of weapon in connection with the murder. Respondent also avoided any chance of conviction for first-degree murder. Petitioner's lawyer

some cases the plea agreement may speak directly to the question of appeal, either specifically contemplating an appeal on particular issues, or specifically waiving the defendant's right to appeal on some or all potential grounds. Cf. Fed. R. Crim. P. 11(c)(6) (effective Dec. 1, 1999) (requiring court to determine, before accepting a guilty plea, that the defendant understands "the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence"). Just as with claims that counsel provided ineffective assistance in advising a defendant to accept a plea agreement, courts considering habeas petitions based on allegedly ineffective assistance in rendering (or not rendering) advice about appeal will inevitably have to evaluate each case on its own facts. *Strickland* properly instructs, however, that in doing so they should demand that habeas petitioners identify with some precision "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," and should then make "every effort * * * to eliminate the distorting effects of hindsight"; to "reconstruct the circumstances of counsel's challenged conduct"—including especially, in this context, the background of consultations surrounding the decision to plead guilty, and whether counsel would have had any reason to expect the defendant to be surprised or dissatisfied with the final outcome of the

specifically recalled that she and a "very experienced" interpreter "spent quite a bit of time, prior to the plea, talking with [respondent] about his options." J.A. 77; see also J.A. 24; C.A. E.R. 85. A lawyer who had lengthy discussions with her client that resulted in his decision to accept the benefits and burdens of a plea agreement would not be professionally derelict, absent some unexpected development, for not later initiating a separate discussion of whether or not to appeal the judgment entered on that plea.

proceedings; and to "evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689-690. Finally, courts must strive to distinguish reasonable errors of prediction, or excusable mistakes of fact, law, or judgment, from the sort of professional lapse that constitutes true ineffective assistance. Compare, *e.g.*, *Murray*, 477 U.S. at 492 (discussing "[a]ttorney error short of ineffective assistance"); *McMann*, 397 U.S. at 774 (short of ineffective assistance, defendant who pleads guilty "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts").[12]

(ii) The close relationship between claims of ineffective assistance in failing to appeal after a plea and claims of ineffectiveness relating to the plea itself also suggests a familiar framework for requiring an appropriate showing of prejudice when the claim is not that counsel failed to carry out the defendant's decision to appeal, but that she failed to provide effective assis-

[12] In part because of the probable frequent overlap between claims of ineffective assistance at the plea and the decision-to-appeal stages, and in part because any standard will require the holding of evidentiary hearings in some cases (as, for example, in this case, where the defendant alleges that counsel promised to file a notice of appeal), the standard we suggest is not likely to impose substantial incremental or avoidable burdens on district courts. Existing procedures allow those courts to concentrate their resources on cases in which an applicant raises potentially meritorious claims. See Rules 4, 8, and 10 of the respective Rules Governing Section 2254 Cases in, and Rules Governing Section 2255 Proceedings for, the United States District Courts (set out as notes following 22 U.S.C. 2254 and 2255). In cases challenging state convictions, moreover, federal district courts should seldom be required to hold evidentiary hearings if the defendant has had an opportunity to develop the factual basis for his claim in state proceedings. See 28 U.S.C. 2254(e) (Supp. III 1997).

tance in raising or advising about the question of appeal in the first place. When a habeas petitioner claims that counsel provided ineffective assistance in connection with his decision to plead guilty—a decision that generally has greater consequences than the decision whether to appeal from the judgment eventually entered on that plea—the law requires him to show not only that counsel's assistance was incompetent, but also that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. A similar standard should apply in cases like the present one.

In cases alleging ineffective counseling about appeal, as in those involving advice about pleas, the question of prejudice—in the sense of whether a competently counseled defendant would have acted differently—depends heavily not only on the details of confidential discussions between the defendant and his lawyer, but also on conclusions about the defendant's actual and hypothetical state of mind. Those are matters uniquely within the knowledge of the defendant—particularly when the defendant may seek to contradict matters otherwise of record. It is therefore appropriate to demand, in cases like this one, that a habeas petitioner satisfy a "prejudice" standard similar to the one announced in *Hill*: The defendant should be required to prove that there is a reasonable probability that, but for counsel's unprofessional errors, he would have directed his attorney to perfect an appeal. That standard will not require a conclusive determination, by the habeas court, of the merits of the underlying claims that the defendant seeks (or might seek, given the benefit of counsel) to present on appeal. Compare *Penson*, 488

U.S. at 86-89; *Anders*, 386 U.S. at 744-745.[13] It will, however, require a sufficient showing of prejudice *in the decision whether or not to appeal* to provide some level of confidence that a court that grants collateral relief is remedying a violation of the defendant's right to counsel, rather than simply excusing the default of a defendant whose failure to appeal was attributable to any of a number of other possible reasons, from conscious decision to his own inadvertence.

II. RESPONDENT HAS SHOWN NEITHER THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT WITH RESPECT TO THE ISSUE OF APPEAL, NOR THAT BUT FOR ERRORS ON HER PART HE WOULD HAVE TAKEN AN APPEAL

The record in this case reveals that the state trial court informed respondent at sentencing of his right to appeal, and to have counsel appointed to represent him on appeal. J.A. 40. The district court found that respondent's counsel did not "promise[]" to file an appeal. J.A. 154, 163, 166. The magistrate judge's observations, based on the evidentiary hearing over which he presided, further indicate his belief that although respondent and his lawyer apparently had a conversation about the issue, respondent did not explicitly ask his lawyer to take an appeal. J.A. 40 ("[S]he is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had [respondent]

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[13] The question is what decision the defendant would have made about appeal if competently counseled. The underlying merits of any claim the defendant might raise on appeal may be relevant to that inquiry, see *Hill*, 474 U.S. at 59, but the focus is on the action the defendant would have taken if competently counseled, see *id.* at 60.

requested that she file a notice of appeal, she would have done so."); see also J.A. 158. The question on which this Court granted review also takes it as a premise that respondent was informed of his right to appeal, but did not make such a request. Pet. i. We therefore assume for present purposes that although respondent knew in general of his right to appeal, he did not clearly express to his attorney any desire to take an appeal from the judgment entered on his guilty plea—but also "did not consent to counsel's failure to file a notice of appeal." J.A. 166; see J.A. 154.

That conclusion does not end the case because, as we have explained, a habeas petitioner should have the opportunity to show that counsel rendered ineffective assistance by, for example, failing to apprise him of an obviously meritorious ground for appeal, or failing entirely to respond to a request for advice and consultation. In this case, the present record reflects at most that there may have been some misunderstanding between respondent and his attorney about the desirability of an appeal. See J.A. 133. It affords, however, no sound basis for concluding that the failure to appeal resulted from any decision, assumption, or error of respondent's counsel that falls outside the normal range of competent guilty-plea representation. There is, for example, no obvious non-frivolous appellate issue that trial counsel should have identified and discussed with her client. See p. 5, *supra*. Nor does the record demonstrate a reasonable probability that, if competently counseled, respondent would have explicitly directed his attorney to appeal.

The present record is therefore insufficient to support the court of appeals' judgment ordering a grant of collateral relief. That judgment should accordingly be reversed, and the case should be remanded for whatever further proceedings that court may deem appropriate in light of the legal standards articulated by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1999

(4)

No. 98-1441

IN THE

Supreme Court of the United States

ERNEST C. ROE, Warden,

Petitioner,

vs.

LUCIO FLORES ORTEGA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does trial counsel have a Sixth Amendment duty to file a notice of appeal in the absence of an express waiver from the defendant when (1) the conviction was entered on a plea of guilty; (2) in counsel's opinion, there are no arguably meritorious grounds for appeal; (3) defendant has been advised of his right to appeal; and (4) defendant has not requested an appeal?

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Ninth Circuit, if upheld, would require the routine reinstatement of appeals in cases where trial counsel correctly and properly determined there were no grounds for appeal. This would impose a pointless burden on state appellate

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

courts, diverting resources from the more important task of deciding genuine issues. This would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The habeas petitioner in the present case, Lucio Flores Ortega, pled guilty to one count of second-degree murder on October 13, 1993. Pet. for Cert. 3; *Ortega* v. *Roe*, 160 F. 3d 534, 535 (CA9 1998). He was represented by Public Defender Nanci Kops at the plea hearing. Magistrates Finding and Recommendations (cited below as "F & R") 2-3.[2] A month later, on November 10, 1993, he was sentenced. Pet. for Cert. 3. At the sentencing, Ortega was again represented by Ms. Kops. See Respondent's Brief in Opposition 1. During the sentencing proceeding, he was advised of his appeal rights and the time limits for filing a notice of appeal by the Fresno Superior Court. Pet. for Cert. 3.

Rule 31(a) of the California Rules of Court requires the defendant to file a notice of appeal within 60 days of sentencing. A notice of appeal was not filed within this time limit. Instead, on March 24, 1994, defendant attempted to file a late notice of appeal. *Ortega*, *supra*, 160 F. 3d, at 535. The notice was rejected as untimely. *Ibid.* He then sought state habeas relief claiming that his "trial counsel was ineffective for failing to file a timely notice of appeal." *Ibid.* Relief was denied by the California Court of Appeals on August 12, 1994. Pet. for Cert. 3.

With his state court remedies exhausted, Ortega then turned to the federal system for relief. *Ortega*, *supra*, 160 F. 3d, at 535. In his federal habeas petition, he again asserted that his trial counsel was ineffective. Pet. for Cert. 4. An evidentiary hearing was held on January 24, 1997, "on the limited issue of

2. This document is in the Joint Appendix. However, *amicus* cannot cite to the pages of Joint Appendix as it was not yet complete by our printing deadline.

the credibility of petitioner's assertions that his state trial counsel promised to file a notice of appeal on his behalf." *Ortega*, 160 F. 3d, at 535; see also Evidentiary Hearing Transcripts (cited below as "Evid. Hrg. Tr.") 2. During the hearing, the Magistrate commented about Ms. Kops, stating that "she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person." Evid. Hrg. Tr. 75-76. The Magistrate further stated that he believed Ms. Kops would have filed a notice of appeal if the defendant requested it. *Id.*, at 76; see also F & R 10-11.

After the hearing, the Magistrate made a number of findings. See Evid. Hrg. Tr. 75-76. As for the specific question, the Magistrate concluded that the respondent had failed to prove "that his counsel had promised to file a notice of appeal." *Id.*, at 76; F & R 3. The Magistrate also concluded that Ortega had not consented to his trial counsel's failure to file a notice of appeal. F & R 5.

The Magistrate then concluded that the Ninth Circuit's opinion in *United States* v. *Stearns*, 68 F. 3d 328 (CA9 1995) was "a 'new rule' which could not be applied retroactively under *Teague* v. *Lane*." *Ortega*, *supra*, 160 F. 3d, at 535. Because *Stearns* was a "new rule," the Magistrate concluded respondent was not entitled to relief. *Ibid.* The District Court adopted the Magistrate's Findings and Recommendations. *Ibid.*

The Ninth Circuit Court of Appeals reversed. *Ibid.* The court concluded that *Stearns* was simply an application of its opinion in *Lozada* v. *Deeds*, 964 F. 2d 956 (CA9 1992) and therefore, not a "new rule" that would be barred by *Teague*. *Ortega*, *supra*, 160 F. 3d, at 536.

This Court granted certiorari on May 3, 1999, limited to the question as stated *infra*, at page 18.

SUMMARY OF ARGUMENT

This case is a simple challenge to the effectiveness of trial counsel and should be analyzed as such. There is no denial of the right to counsel on appeal when there never was an appeal at all. Trial counsel did not fulfill the state's procedural requirements for an appeal, and, under the principles of *Coleman* v. *Thompson*, this omission should be judged like any other.

The Ninth Circuit, by distorting the test of *Strickland* v. *Washington,* has placed a new Sixth Amendment duty on trial counsel. Current Supreme Court authority does not require this distortion. It simply recognizes that a proper standard for state habeas cases is being debated within the circuits and establishes a procedural rule for federal defendant cases. The Court has developed in *Strickland* a workable test that effectively balances the competing interests involved in ineffective assistance claims. This test should be applied. Application of the test demonstrates that trial counsel's decision not to file a notice of appeal is not always ineffective and therefore, a presumption of prejudice is not warranted.

In *Caspari v. Bohlen*, this Court explained that *Teague* is a threshold question in every habeas corpus case. The Ninth Circuit relied on its own opinion in *Lozada* v. *Deeds* to establish the legal landscape at the time Ortega's conviction became final. A proper survey reveals that the imposition of a duty to file unrequested, meritless appeals remains debatable, and thus would be a "new rule" contrary to *Teague* v. *Lane*.

ARGUMENT

I. The present case is one of challenged effectiveness of trial counsel, not denial of appellate counsel.

The Ninth Circuit started down the wrong track in *Lozada* v. *Deeds*, 964 F. 2d 956 (CA9 1992), following the remand from this Court in *Lozada* v. *Deeds*, 498 U. S. 430 (1991). The

Ninth Circuit held that when trial counsel does not file a notice of appeal, "this is the 'actual or constructive denial of the assistance of counsel altogether' referred to in *Strickland* [v. *Washington*, 466 U. S. 668, 692 (1984)]." 964 F. 2d, at 958. The consequence of this conclusion was that no showing of prejudice, *i.e.*, a reasonable probability of a different result, was thought to be necessary. *Ibid.*

Thus, in this situation, the *Strickland* prejudice inquiry and the "duty" question of whether trial counsel was obligated to file the notice of appeal come down to the same question. The State of California does not deny that trial counsel has a duty to appeal if there are arguably meritorious grounds. Indeed, the state has gone so far as to affirmatively impose that duty itself by statute. See Cal. Penal Code § 1240.1(b). The state also requires trial counsel to appeal when defendant requests an appeal. *Ibid.* The only area of dispute involves appeals which are neither requested nor meritorious. There is no denial of a right to counsel on such an appeal if there is no right to such an appeal at all.

By holding that counsel must file groundless appeals in the absence of an express waiver, rather than only upon express request, the Ninth Circuit has effectively added a new requirement to California's appellate process. In this regard, it is helpful to remember what this Court has said about the latitude the Constitution leaves to the states in this area:

> "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A state may decide whether to have direct appeals in such cases, and if so under what circumstances.
>
> . . . . .
>
> "So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated." *Carter* v. *Illinois*, 329 U. S. 173, 175-176 (1946).

Evitts v. *Lucey*, 469 U. S. 387, 393 (1985) reaffirmed that states may provide appeals or not, as they choose, but also held that if the state does provide appeals, the procedure must comport with due process, *ibid.*, which includes effective assistance of counsel. *Id.*, at 396.

California's rule that a defendant who wishes to appeal must file a timely notice is, of course, a perfectly legitimate rule serving important state interests. Since the mid-1970s, this Court's decisions on procedural default in habeas cases have recognized the importance of federal court respect for state procedural rules. The history is traced in *Coleman* v. *Thompson*, 501 U. S. 722, 745-749 (1991).

Coleman involved the same type of default as the present case—a failure to file the notice of appeal, thus defaulting the entire appeal rather than a particular issue. *Id.*, at 749. *Coleman* considered and rejected the contention that this made a difference in the standard to be applied. *Id.*, at 749-750. It is an "irrational distinction" to separate one kind of default from another. The same rule applies to both.

The procedural default rule and the ineffective assistance of counsel rule are closely related. Functionally, the right to effective assistance serves as a safeguard protecting defendants from miscarriages of justice as a result of defaulted claims. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). The two rules are also related in their common "prejudice" element. The prejudice element of the ineffective assistance test is the same as the "materiality" element of the *Brady* v. *Maryland*, 373 U. S. 83 (1963) line of cases. See *Strickland* v. *Washington*, 466 U. S. 668, 687, 694 (1984). The prejudice element of the procedural default test is also the same as the materiality element of *Brady*. See *Strickler* v. *Greene*, 527 U. S. __ (No. 98-5864, June 17, 1999) (slip op., at 33) (lack of "reasonable probability" negates both materiality and prejudice). Thus, the two prejudice elements are equal to each other. See *Schlup* v. *Delo*, 513 U. S. 298, 332-333 (1995) (O'Connor, J., concurring)

(implicitly equating *Strickland* prejudice test with default prejudice test).

Because the two tests are so similar, it makes little difference whether an issue defaulted by counsel is analyzed as an independent claim of ineffective assistance or under the rule for procedural default, with ineffective assistance as the "cause." See *Smith* v. *Murray*, 477 U. S. 527, 535-536 (1986) (using *Strickland* standard of competence to reject claim of "cause").

It *would* make little difference, that is, unless the federal habeas court takes the double step of (1) imposing a duty on trial counsel where none existed before, and (2) dispensing with the *Strickland* prejudice requirement. In that event, the effect would be to subvert the state's decision regarding "under what circumstances" it will hear appeals, a decision which this Court clearly stated in *Carter, supra,* at 5, belongs to the states and not to the federal judiciary.

The conflict between the holding in the present case and the policy of respecting state procedure is easily avoided by recognizing the fallacy of *Lozada*'s holding that this is a case of "denial of . . . counsel altogether." There is no right to counsel in a proceeding which never happens. The right to counsel on appeal depends entirely on the state's decision to allow the appeal. See *Evitts*, *supra*, 469 U. S., at 393-394.

The State of California has decided not to impose on counsel the duty to file a notice of appeal when the appeal is neither requested nor meritorious. The question is whether *that* decision comports with the demands of the Due Process Clause. *Cf. id.*, at 393. The focus is on the act or omission of *trial* counsel in initiating the appeal or not doing so. Does that omission amount to ineffective assistance of counsel? This is one omission in the course of representation in a proceeding in which the state *did* provide counsel; it is not a denial of counsel altogether.

II. The standard test of *Strickland* v. *Washington* should be applied.

In *Strickland*, the Court established the now familiar two-step deficient performance/prejudice analysis. In order to obtain relief under this analysis, "a defendant must show that: (1) his attorney 'made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment'; and (2) he suffered prejudice as a result." *United States* v. *Horodner*, 993 F. 2d 191, 194 (CA9 1993) (quoting *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984)) (internal quotation marks omitted).

This test has effectively balanced the competing interests involved in habeas review. In establishing its test, *Strickland* considered both the "finality concerns" of the state and the need to ensure a fair, reliable proceeding. 466 U. S., at 694. Again, the procedural default cases are strongly analogous. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners . . . . ¶ On the other hand, there is the state's interest in the integrity of its rules and proceedings and the finality of its judgments . . . ." *Reed* v. *Ross*, 468 U. S. 1, 10 (1984). The *Strickland* test reaches the same balance by providing a forum for review when it is alleged a defendant's Sixth Amendment rights have been violated. However, it does not make access so easy that the federal court becomes a place for a second trial. *Strickland* explains that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, *supra*, 466 U. S., at 691. This standard protects the state's interest in the finality of its judgments by insuring that only errors that are "so serious as to deprive the defendant of a fair trial" are overturned on habeas review. *Id.*, at 687. *Strickland*'s prejudice element, like that of the procedural default test, also promotes comity and federalism by recognizing that "[f]ederal intrusion into state criminal trials frustrate both the state's sovereign power to

punish offenders and their good-faith attempts to honor constitutional rights." *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982).

The Ninth Circuit, however, has interpreted *Strickland*, *supra*, along with *Rodriquez* v. *United States*, 395 U. S. 327 (1969) as requiring a presumption of prejudice "if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada* v. *Deeds*, 964 F. 2d 956, 958 (CA9 1992); see also *United States* v. *Stearns*, 68 F. 3d 328, 330 (CA9 1995) (extending the *Lozada* reasoning to appeals after guilty pleas). This presumption effectively places a Sixth Amendment duty on trial counsel to file a notice of appeal without regard to counsel's evaluation of the merits of an appeal. *Strickland* did explain that "[i]n certain Sixth Amendment contexts, prejudice is presumed." However, this is not one of the situations that *Strickland* identified as deserving of a presumption of prejudice. See *post*, at 15-17.

A. Lozada/Rodriquez.

An overly broad interpretation of this Court's decision in *Lozada* v. *Deeds*, 498 U. S. 430 (1991) (*per curiam*) sent the Ninth Circuit off course in its analysis of ineffective assistance of counsel claims and directed it towards the categorical approach it has adopted when the right to appeal is at issue. In *Lozada*, this Court was asked to decide whether the Ninth Circuit Court of Appeals had erred in denying a certificate of probable cause. *Id.*, at 432. Lozada had sought habeas relief from the Federal District Court based on a claim of ineffective assistance of counsel. *Ibid.* The District Court dismissed the petition, concluding that Lozada had failed to show prejudice under *Strickland*'s deficient performance/prejudice test. *Ibid.* The District Court conclusion was based on the fact that "Lozada had not indicated what issues he would have raised on appeal and had not demonstrated that the appeal might have succeeded." *Ibid.* A certificate of probable cause was subsequently denied by both the District Court and the Court of Appeals, based on this lack of prejudice. This Court recognized that in other circuits prejudice had been presumed in situations

similar to Lozada's; therefore, the standard for prejudice was " 'debatable among jurists of reason'," and the issue *could* be resolved in a different manner. *Ibid.* (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893, n. 4 (1983)). Because of this divergence, the Court concluded that Lozada had made a "substantial showing of the denial of [a] federal right," *id.*, at 893, and remanded the case to the Court of Appeals for the issuance of a certificate of probable cause. *Lozada*, 498 U. S., at 432.

This Court's *Lozada* opinion never resolved whether a presumption of prejudice was the appropriate standard. The Court simply acknowledged that the issue was debatable,[3] and therefore, met the standard for issuance of a certificate of probable cause. Any suggestion taken from this Court's *Lozada* opinion that a presumption of prejudice is necessarily the correct standard is in error, as "new rules of constitutional law are not established in dicta . . . ." *Henderson* v. *Morgan*, 426 U. S. 637, 651 (1976) (White, J., concurring).

Concluding that an issue is debatable is very different from deciding the point. For example, in *Caspari* v. *Bohlen*, 510 U. S. 383 (1994), this Court was asked to decide "whether the Double Jeopardy Clause prohibits a state from twice subjecting a defendant to a *noncapital* sentence enhancement proceeding." *Id.*, at 386 (emphasis added). The Court, instead, resolved the case on *Teague* grounds. *Id.*, at 397. The question presented in *Caspari* was not resolved until four years later, in *Monge* v. *California*, 524 U. S. 721, 141 L. Ed. 2d 615, 628, 118 S. Ct. 2246, 2253 (1998).

The *Lozada* Court cited *Rodriquez* v. *United States*, 395 U. S. 327, 330 (1969) as additional authority for the debate among the circuits. See *Lozada*, *supra*, 498 U. S., at 432. This citation simply recognized the circuits' reliance on *Rodriquez*

3. This debate among the circuits as recognized by this Court also supports the conclusion that *United States* v. *Stearns*, *supra*, announced a new rule for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989). See *post*, Part III.

in forming the presumption of prejudice. It did not, however, conclude that *Rodriquez* should alter the established *Strickland* prejudice analysis. On remand, the Ninth Circuit's opinion in *Lozada* v. *Deeds* attempted to reconcile *Rodriquez* and *Strickland* and concluded that Lozada's circumstances amounted to "the 'actual or constructive denial of the assistance of counsel altogether' referred to in *Strickland*." *Lozada*, *supra*, 964 F. 2d, at 958. This conclusion was then extended to appeals from guilty pleas in *Stearns*, without further analysis of the appropriateness of the presumption. *Stearns*, *supra*, 68 F. 3d, at 330. The Ninth Circuit's conclusion, as well as those from other circuits which have relied on *Rodriquez*, fails to recognize that *Rodriquez* was a federal rules case and not a constitutional case. This results in a distortion of *Strickland*'s limited presumed-prejudice category in order to accommodate *Rodriquez*.

In *Rodriquez*, petitioner's counsel had failed to file a notice of appeal from his federal conviction. *Rodriquez*, *supra*, 395 U. S., at 328. Petitioner then sought post-conviction relief pursuant to 28 U. S. C. § 2255 from the Federal District Court, claiming that "his retained counsel had fraudulently deprived him of his right to appeal." *Rodriquez*, 395 U. S., at 328-329. The Ninth Circuit had in place a procedural rule that required § 2255 applicants "in petitioner's position to disclose what errors they would raise on appeal and to demonstrate that denial of an appeal had caused prejudice." *Id.*, at 329. The Court noted, "Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel." *Id.*, at 330.[4] A showing of prejudice was too high a hurdle for the unrepresented petitioner, and the Court concluded that no such showing would be required to reinstate the appeal.

The *Rodriquez* holding, however, is not a constitutional mandate. It is simply a federal procedural rule. The Constitu-

4. 18 U. S. C. § 3006A was amended the next year to expand appointments in collateral proceedings. See Pub. L. No. 91-447, § 1, 84 Stat. 916, 919 (1970) (adding subd. (g), predecessor of present subd. (a)(2)(B)); H. Rep. No. 91-1546, 1970 U. S. Code Cong. & Admin. News 3982, 3992-3993.

tion is not invoked anywhere in the decision as requiring this mode of proceeding. This Court has "more latitude in setting standards . . . in federal courts under [its] supervisory power than [it has] in interpreting the provisions of the Fourteenth Amendment . . . ." *Mu'Min* v. *Virginia*, 500 U. S. 415, 424 (1991). A decision establishing a procedure for federal courts, without indicating that the procedure is constitutionally required, does not by itself impose that same procedure on state courts. See also *Victor* v. *Nebraska*, 511 U. S. 1, 11 (1994).

The *Rodriquez* holding has the value of efficiency in a unitary system where federalism is not a concern. A lawyer is needed to evaluate the case to determine if there are any arguably meritorious issues. See *Rodriquez*, *supra*, 395 U. S., at 330. The alternatives then are (1) appoint counsel for the § 2255 proceeding to identify issues and, if substantial issues are found, grant relief, reinstate the appeal, and appoint counsel for the appeal; or (2) simply reinstate the appeal and appoint appellate counsel. Where the appointment funds all come out of the same pot, number 2 has the virtues of simplicity and brevity.

When proceedings cross the federal-state boundary, though, things get more complicated. A grant of relief in this case would require the State of California to appoint counsel and hear and decide the appeal, when its legitimate rule of procedure bars that appeal. This burden can and should be imposed on the state if, and only if, there is a real probability of injustice.

The state has already taken its own steps to safeguard against injustice. It has already shouldered the expense of providing counsel to determine whether Ortega has arguably meritorious issues to appeal. That job has already been done by trial counsel, Ms. Kops.

Ms. Kops' conclusion that there is nothing to appeal is hardly surprising in a guilty plea case. The plea waives most issues. See, *e.g.*, *United States* v. *Broce*, 488 U. S. 563, 573-574 (1989) (double jeopardy claim waived). The whole

purpose of the *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969) advisements is to limit attacks on pleas.

If the federal habeas court does not have confidence in the safeguards provided by the state court, then it can and should appoint counsel itself to identify the issues that would have justified an appeal. If there are no such issues, then the habeas petitioner's claim fails both prongs of *Strickland*; trial counsel did her job correctly, and her omission caused no harm to her client. In such a case, there is no justification for pushing the burden of yet another frivolous appeal on the already overloaded state appellate courts.

B. Deficient Performance.

In *Strickland*, this Court explained that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U. S., at 687-689. The Court further explained that "if the defendant makes an insufficient showing on one" of the components of the test, the court does not need to address both components. *Id.*, at 697. The court is, however, required to establish both components before concluding that counsel provided ineffective assistance in violation of the defendant's Sixth Amendment rights. In *Kimmelman* v. *Morrison*, 477 U. S. 365, 381 (1986), the Court again reiterated that "the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." The Ninth Circuit's presumption of prejudice effectively alleviates the defendant's burden and eliminates any analysis of the reasonableness of counsel's performance in the present case. To be sure, the deficient performance and prejudice components of the *Strickland* test are uniquely intertwined in the present case. This fact, however, does not suggest that the Court should scrap the *Strickland* test whenever a defendant's appeal rights are at issue. Rather, it reinforces the necessity of a complete *Strickland* analysis.

In *Strickland*, this Court warned that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland, supra*, 466 U. S., at 689. The Ninth Circuit's approach does not give trial counsel's performance the deference it should be afforded under *Strickland*. Rather, it assumes incompetence. The Ninth Circuit's focus is on the defaulted appeal rights. With this focus, it assumes counsel was deficient. *Nix* v. *Whiteside*, 475 U. S. 157, 165 (1986) (quoting *Strickland*, 466 U. S., at 689), explained that in order "[t]o counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " The Ninth Circuit should have indulged in this same strong presumption.

Analysis under California's standards reveals the reasonableness of counsel's actions in the present case. Penal Code section 1240.1(b) requires that trial counsel

> "execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal."

This rule incorporates many of the principles directing this Court's Sixth Amendment jurisprudence. Because *Strickland* recognized that "[c]ounsel's function is to assist the defendant" and that "counsel owes the client a duty of loyalty . . . ," 466 U. S., at 688, Penal Code section 1240.1(b) has statutorily mandated as much with its requirement that trial counsel pursue an appeal when it is in the defendant's interest. In *United States* v. *Cronic*, 466 U. S. 648, 656, n. 19 (1984), the Court explained that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical." (Citation omitted). Recognizing that counsel has an ethical duty to keep frivolous appeals

out of the courts, see, *e.g.*, ABA Model Rules of Professional Conduct, Rule 3.1 (1992); ABA Model Code of Professional Responsibility, DR 7-102(A)(2), EC 7-4 (1983); *Anders* v. *California*, 386 U. S. 738, 744 (1967), the Penal Code only made filing a notice of appeal required if there were "arguably meritorious grounds."

Trial counsel was not ineffective in the present case. The defendant did not request an appeal. If he had, the District Court Magistrate believed, trial counsel would have filed a notice of appeal. See Evid. Hrg. Tr. 76; see also F & R 10-11. Therefore, counsel was under no duty to file an appeal unless there were "arguably meritorious grounds" for an appeal. At the District Court evidentiary hearing, trial counsel testified that she would not have encouraged Mr. Ortega to appeal, that the only grounds for appealing would be that the judge abused his discretion in denying probation, and that the claim "would almost certainly fail." Evid. Hrg. Tr. 44. The Magistrate's Findings and Recommendations further suggested that trial counsel, under California law, had no duty to file an appeal. F & R 11. The Ninth Circuit ignored California's standards and instead placed an additional duty on counsel to obtain consent before choosing not to file an appeal.

C. Prejudice.

Strickland identified three situations in which the Sixth Amendment requires a presumption of prejudice. *Strickland, supra*, 466 U. S., at 692-693. The first two situations occur when there is either an "actual or constructive denial of the assistance of counsel" or "various kinds of state interference with counsel's assistance." *Id.*, at 692. Prejudice is presumed in these situations because 1) "case-by-case inquiry into prejudice is not worth the cost," 2) the violations are "easy to identify," and 3) the violations are "easy for the government to prevent." *Ibid.* The other situation where prejudice is presumed occurs when defense counsel is burdened with an actual conflict of interest. This last situation, the Court explained, only warrants "a similar, though more limited, presumption of

prejudice." *Ibid.* Trial counsel's failure to file a notice of appeal is not one of the situations that the *Strickland* Court contemplated deserving of a presumption of prejudice.

Case-by-case inquiry into prejudice is well worth the cost when a notice of appeal is not filed by trial counsel. Section 1240.1(b) of the California Penal Code requires trial counsel to file a notice of appeal when there are "arguably meritorious" grounds for appeal. This requirement, in turn, forces a review by trial counsel of the case. Trial counsel, who is closest to the case and the defendant's cause, is in the best place to uncover any appealable issues. If trial counsel decides not to file a notice of appeal, it is unlikely that the loss of appeal resulted in prejudice that so undermined the reliability of the proceeding. Cases in this category with actual prejudice will be the rare exception, rather than the rule, the exact opposite of the category identified by *Strickland* as appropriate for a rule of presumed prejudice.

In addition, it is nearly impossible for the government to identify and prevent Sixth Amendment violations occurring within the attorney-client relationship. To uncover whether a defendant wants to appeal would require inquiry into privileged conversations, and prevention would require taking on defense counsel's role and would, most definitely, "interfere with the constitutionally protected independence of counsel . . . ." *Strickland, supra*, 466 U. S., at 689.

Finally, when counsel decides not to file a notice of appeal there is typically no conflict of interest that would justify a presumption of prejudice. A conflict of interest occurs when counsel "breaches the duty of loyalty," *id.*, at 692, and occurs in the multiple representation setting. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 348-350 (1980) (analyzing a series of conflict of interest cases all involving multiple representation). This is not a multiple representation case. Therefore, counsel did not represent interests contrary to Ortega's. Counsel's failure to file a frivolous, unrequested appeal did not breach the duty of loyalty.

In *Cronic* v. *United States*, 466 U. S. 648, 659, n. 26 (1984), the Court explained that, apart from circumstances the "magnitude" of which require a presumption of prejudice, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Because in the present situation none of the presumption of prejudice categories is applicable, the defendant needs to demonstrate that counsel's failure to file a notice of appeal prejudiced him. The standard for prejudice requires the defendant to establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, 466 U. S., at 694. This standard, in the present case, does not require the defendant to make his appeal on habeas review. In *Strickler* v. *Greene*, 527 U. S. __ (No. 98-5864, June 17, 1999) (slip op., at 27), for purposes of *Brady* materiality analysis,[5] the Court recently reiterated that the " 'question is not whether the defendant would more likely than not have received a different verdict . . . , but whether . . . he received a fair trial, understood as a trial resulting in a verdict of worthy of confidence.' " (Quoting *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995)). If there are substantial grounds for an appeal, it is reasonably probable that the outcome would be different if a full appeal were permitted. This is enough to establish prejudice. The defendant does not have to show that he would have succeeded on appeal. The possible success of an appeal is enough to "undermine confidence in the outcome." *Strickland, supra*, 466 U. S., at 694. No such showing was made in this case.

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5. See *supra*, at 6, establishing that *Brady* materiality analysis is the same as *Strickland* prejudice.

III. Imposition of a duty to file unrequested, meritless appeals would be a "new rule" contrary to *Teague* v. *Lane*.

This Court granted review limited to the second question presented by petitioner. The question asks "whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of such a request by the defendant, particularly where the defendant has been advised of his appeal rights." The Court denied certiorari on Question 1, which asked a specific question regarding the application of *Teague* v. *Lane*, 489 U. S. 288 (1989). That question was, "1. Whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is 'dictated by precedent' within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)."

Amicus takes the denial of certiorari on Question 1 to mean that the Court will not consider an argument that circuit precedent is irrelevant to the *Teague* analysis and that *only* Supreme Court precedent may be considered. *Cf.* 28 U. S. C. § 2254(d)(1). We make no such ambitious argument here, but only follow the path well marked by this Court's precedents. Notwithstanding the limited grant of certiorari, because this case involves a federal habeas corpus request for relief based on what the government has argued is a new rule, the general *Teague* question, as opposed to the highly specific issue posed in Question 1, is fairly included in the "merits" question.[6]

As this Court explained in *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), "[a] threshold question in every habeas case . . . is whether the court is obligated to apply the *Teague* rule to the defendant's claim." The federal District Court concluded that the petitioner is not entitled to relief, because he seeks the benefit of a new rule announced by the Ninth Circuit. The

6. In some cases, this Court has decided retroactivity questions raised only by *amicus* and not briefed or argued by the party supported at all. See, *e.g.*, *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967).

decision in this case imposes an obligation on the State of California to hear and decide appeals in cases where counsel does not believe there are grounds to appeal and defendant has neither expressly requested nor expressly waived the appeal. This obligation is "new" "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, 489 U. S., at 301 (emphasis in original).

To determine whether *Teague*'s nonretroactivity principle should bar relief for a state prisoner, there are three steps that should be followed. See *Caspari*, *supra*, 510 U. S., at 390.

> "First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation], and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,'[citation]. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Ibid.*

Respondent's conviction, for purposes of nonretroactivity analysis, became "final" on January 9, 1994. Pet. for Cert. 3, n. 3.

A proper survey of legal landscape includes the opinions of this Court, and, if no definitive answer lies there, of all the federal circuits, and of the state courts. See *Caspari*, *supra*, 510 U. S., at 393-395. Precedent of a single federal circuit cannot be sufficient, because the question is "whether a *state* court . . . would have felt compelled by existing precedent," *id.*, at 390 (emphasis added), and precedent of the lower federal courts is not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21. Unanimity of the lower courts, or something close to it, may

indicate a rule is dictated by existing precedent. Conversely, a substantial split of authority demonstrates that " 'reasonable jurists [could] disagree.' " *Caspari*, 510 U. S., at 395. The authorities cited by the Attorney General, see Pet. for Cert. 18-22; Brief for Petitioner, part I, are more than sufficient to establish that, taking the legal landscape as a whole, the result Ortega seeks is not *dictated* by precedent. For the Ninth Circuit to decide to the contrary based on its own precedent alone, ignoring the rest of the "landscape," was clear error under *Caspari*.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 1999

Respectfully submitted,

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CHRISTINE M. MURPHY

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

(8)

No. 98-1441

In the

SUPREME COURT OF THE UNITED STATES

ERNEST C. ROE, Warden,

Petitioner,

- vs -

LUCIO FLORES ORTEGA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of over 10,000 attorneys, and another 28,000 affiliate members in 80 affiliate organizations in 50 states. NACDL is recognized by the American Bar Association ("ABA") as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*.[2]

The primary interest of *amicus* NACDL in this matter is the maintenance of standards of legal representation so as to ensure that convicted criminal defendants who choose to waive their direct appeals as of right do so knowingly and intelligently.

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[1] All parties have consented to the appearance of NACDL in this matter, and letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A search of published opinions and orders in the Westlaw SCT database yielded over 75 references to NACDL in the capacity of *amicus curiae*. The references extended over a period of nearly 25 years.

STATEMENT OF THE CASE

Amicus NACDL respectfully directs the Court to the Statement of the Case in Respondent's Brief.

SUMMARY OF ARGUMENT

As an organization of criminal defense lawyers, NACDL views this case as turning upon the standard to which its members expect to be held in counseling our clients whether to file an appeal from a criminal conviction and sentence. NACDL writes in order to supplement the parties' arguments from this important perspective.

Criminal appeals serve a crucial function in the Constitutional scheme. Even where defendants have entered pleas of guilty, appeals from the imposition of sentence have increasingly taken on a central role. The decision whether to appeal is one of a handful of trial-related decisions so fundamental that only the client, and not the attorney, may make it. And any waiver of the right to appeal must be voluntary and intelligent. Unlike other fundamental trial decisions, however, such a waiver takes place out of court, and there are no procedures to govern it. Because the decision whether to appeal is fraught with legal technicalities, it must be guided by Constitutionally adequate counsel.

The seminal case of *Strickland v. Washington* imposes a "basic duty" upon counsel to consult with the client as to "important" matters. *A fortiori,* this duty to consult applies to the "fundamental" decision whether to appeal. That decision requires familiarity with the record and with applicable law, as well the exercise of tactical judgment. Without at least some level of consultation, then,

the client's decision whether to appeal cannot be a meaningful one. An attorney therefore cannot rely upon the mere silence of an unsophisticated client to justify the failure to file an appeal. Nor can the attorney discharge even the minimal duty to abide by the client's wishes without first ascertaining what those wishes are. An attorney who fails to file an appeal, without having consulted with the client, has accordingly both usurped a decision that belongs to the client and failed to fulfill the Sixth Amendment duty of effective representation.

This Court's recent holding in *Peguero v. United States* highlighted that defendants' actual knowledge of their appeal rights is crucial to an informed decision whether to appeal. The burden of supplying that knowledge, and rendering advice as to that decision, has long been placed upon defense counsel. NACDL, on behalf of its members, welcomes the responsibility to ensure that waivers of the right to appeal are knowing and voluntary. The Court should take this opportunity to clarify counsel's Constitutional duty to consult with the client and ascertain the client's wishes before forgoing the right to appeal.

Finally, NACDL endorses the position of Respondent that "prejudice" in this context does not require the defendant to demonstrate that an appeal would have been meritorious or successful. Any defendant denied the right to control such a fundamental aspect of the case has been prejudiced. Moreover, it is impractical for trial courts to prejudge the likelihood of success of an appeal without the assistance of an advocate on defendant's behalf. In the alternative, as stated in the *amicus* brief of the United States, "prejudice" should at most require a showing that defendant would have filed an appeal absent counsel's errors.

For the reasons expressed below and in Respondent's brief, the judgment below should be affirmed.

ARGUMENT

MINIMUM SIXTH AMENDMENT STANDARDS OF PERFORMANCE REQUIRE THAT AN ATTORNEY CONSULT WITH THE CLIENT AND ASCERTAIN WHETHER THE CLIENT WISHES TO APPEAL.

A. Introduction: The importance of criminal appeals in the Constitutional scheme.

Over forty years ago, this Court observed that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Over thirty-five years ago, this Court observed that the right to appeal from a federal criminal conviction had become, "in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 440 (1962). The decision whether to take a criminal appeal is one of a handful of decisions that is so "fundamental" that only the client, not the lawyer, may make it. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

This is so because a direct appeal is the primary backstop against trial-court error. Accordingly, this Court has relied upon the primacy of direct appeal in order to justify restrictions upon the availability of Section 2255 and habeas relief -- restrictions relied upon by Petitioner here:

> Direct review is the principal avenue for challenging a conviction. 'When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of

> federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. ...'

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).[3]

It is not the case, as Petitioner suggests, that the right to appeal is diminished in importance after the entry of a

[3] Over a hundred years ago, this Court stated that the right to take a criminal appeal is not inherent in the notion of due process in *McKane v. Durston*, 153 U.S. 684, 687 (1894), a holding that continues to be cited in modern cases. See, e.g., *Jones v. Barnes*, 463 U.S. at 751. Providing for an appeal as of right, however, amounts to an implicit determination "that [the government] was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with the law." *Evitts v. Lucey*, 469 U.S. 387, 403-04 (1985). Moreover, where the right to an appeal exists, it must be administered in keeping with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. at 400-01. The cases before this Court have generally considered not the right to appeal *per se*, but rather the minimal restrictions or burdens that may constitutionally be attached to a statutory right to appeal. E.g., *Ross v. Moffitt*, 417 U.S. 600, 605-08 (1974) (surveying line of cases dealing with right to counsel, filing fees, access to transcripts, etc., on criminal appeals). See also *Evitts v. Lucey*, 469 U.S. at 393 (collecting cases); *Ross v. Moffitt*, 417 U.S. at 605-08 (synthesizing earlier case law, and finding no right to counsel for discretionary, second or subsequent level of appeal); *Draper v. Washington*, 372 U.S. 487 (1963) (availability of free transcript to indigent defendant seeking an appeal cannot be conditioned on trial court's finding of nonfrivolousness); *Burns v. Ohio*, 360 U.S. 252 (1959) (striking down $20 filing fee for indigents to move for leave to appeal from intermediate appellate court's affirmance of criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down requirement that appellant obtain transcript, where no provision made for indigent defendants). The right to appeal, if not Constitutional in origin, is protective of Constitutional rights and is certainly hedged about by Constitutional protections.

guilty plea. It is of course true that few grounds exist to attack guilty pleas themselves. See *United States v. Broce*, 488 U.S. 563 (1989) Nevertheless, the focus of criminal appeals has increasingly shifted to appeals from imposition of sentence. In the federal system, the Sentencing Guidelines have imposed complex legal standards upon the imposition of sentence, leading to an explosion of appellate activity.[4] Among the States, too, the trend is toward more legal standards, and more appeals, in the sentencing area.[5] Often at stake on appeal is a considerable difference in the length of time to be served in prison. That is the crucial issue for many defendants, perhaps even more so in the case of those who plead guilty. Appellate reversals, with concomitant reductions in sentence, are common under the modern Sentencing Guidelines regime. This Court's holding as to the scope of counsel's Constitutional responsibility will have wide ramifications, not only in the federal system and the States in which sentencing appeals are common today, but also in those States that will increasingly see such appeals in the future.

[4] See K. Reitz, SENTENCING GUIDELINE SYSTEMS AND SENTENCE APPEALS: A COMPARISON OF FEDERAL AND STATE EXPERIENCES, 91 NW. U. L. REV. 1441, 1492 (1997) (65% of federal criminal appellate decisions in 1993-94 were sentencing appeals); C. Goodwin, SUMMARY: 1996 COMMITTEE ON CRIMINAL LAW MEMO ON WAIVERS OF APPEAL AND ADVISEMENT OF THE RIGHT TO APPEAL, 10 FED. SENT. R. 212, at n.2 (1998)(federal criminal appeals doubled from 1987 to 1994, while overall appeals increased only 30%).

[5] See R. Lewis, THE KANSAS SENTENCING GUIDELINES ACT, 38 WASHBURN L. J. 327 (1999) (Judge of Kansas Court of Appeals notes that criminal appeals went from 23.2% to 55.1% of caseload in the period 1985-1994, and attributes difference to adoption of state sentencing guidelines).

In general, then, the right to an appeal is a bulwark of procedural and substantive fairness. A defendant's waiver of this valuable right should not be lightly inferred.

B. The decision whether to file a criminal appeal belongs to defendant alone.

The question presented here is really this: May a reasonable attorney assume that a silent client does not wish to appeal, or does the Constitution require the attorney to consult with the client and ascertain the client's wishes before presuming to waive that fundamental right on the client's behalf? One potential answer to that question is clearly wrong: The attorney may not rely solely upon his or her own judgment. Rather, the client's wishes are paramount because the decision whether to appeal is reserved to the client alone.

This Court has recognized that there are "fundamental decisions" that only the defendant, and not counsel, can make. These number only four: whether to plead guilty; whether to waive a jury; whether to testify; and whether to take an appeal. *Jones v. Barnes*, 463 U.S. at 751.[6]

These decisions are fundamental because they involve waivers of important rights. A waiver is ordinarily defined as an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The particular nature of the waiver procedure, however, varies with the context. Whether advice of counsel is required, and what procedural safeguards are

[6] At least one lower court has expressed doubt as to whether this list is exclusive. *United States v. Boigegrain*, 155 F.3d 1181, 1191 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 828 (1999).

appropriate, depend upon the nature and importance of the right being waived.

If the right is routine -- e.g., the decision to forgo an ordinary evidentiary objection, or to absent oneself from a routine trial conference -- no special protections have been required. A statement from counsel is deemed sufficient. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 527-28 (1985). For certain important Constitutional rights only an explicit affirmative waiver by the client will suffice. *E.g.*, *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to trial counsel); *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion) (judge's responsibility to ensure knowing waiver of counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required for suspect in custody to waive right to counsel and to remain silent); *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea waiving panoply of trial rights).

For some of these highly important rights, only an in-court waiver, by the client, after questioning by the court, is sufficient. Of the four "fundamental" trial decisions, two lend themselves to this treatment. The decision to plead guilty, for example, is committed to the defendant. Due process requires that the court closely question the defendant to ensure that the waiver is a fully knowledgeable one. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Similarly, the defendant alone may decide whether to waive a jury. Such a waiver is so bound up with the trial procedure that it necessarily occurs in court, and is conditioned upon the approval of the court, as well as the "express and intelligent consent of the defendant." See

Singer v. United States, 380 U.S. 24, 34 (1965); *Patton v. United States*, 281 U.S. 276, 312 (1930).[7]

Defendants' other two fundamental trial decisions, on the other hand, do not lend themselves to a formal, on-the-record waiver. This is not because the rights at stake are any less important, or because it is any less important for defendants to invoke or waive those rights in an informed manner. The difference is that the system relies upon defense counsel to ensure that the defendant personally chooses to waive those rights.

Thus, for example, the decision whether to testify unquestionably belongs to the defendant alone. Any waiver of such a fundamental trial right must be informed and intelligent. See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973); U.S. Const. amend. V. Nevertheless, for various reasons -- including the danger of invading the attorney client privilege or unintentionally coercing defendants -- this Court and the

[7] By rule, the consent of the prosecutor is required as well in the federal system. Fed. R. Crim. P. 23(a). This is an additional, not a substitute, requirement for waiver; of course waiver of a jury cannot be forced upon the defendant by the prosecutor or the court. Rule 23(a) also requires that any waiver be in writing.

Colloquy with the defendant who wishes to waive a jury is not specifically required as a matter of Constitutional law, though some courts have suggested such a practice or imposed it pursuant to their supervisory power. E.g., *Marone v. United States*, 10 F.3d 65, 67-68 (2d Cir. 1993)(suggesting colloquy procedure); *United States v. Rodriguez*, 888 F.2d 519, 526-28 (7th Cir. 1978) (supervisory power); *United States v. Anderson*, 704 F.2d 117, 118-19 (3d Cir. 1983) (waiver in writing is sufficient, though colloquy is ordinary and preferred procedure); *Wyatt v. United States*, 591 F.2d 260, 264-65 (4th Cir. 1979) (endorsing the practice to ensure intelligent waivers).

lower federal courts have never held that due process requires an in-court colloquy with the defendant who chooses not to testify. Instead, the federal courts have relied solely upon counsel to advise the defendant as to this decision. In particular, it is defense counsel's job to ensure that defendant's decision is uncoerced and knowledgeable.[8]

The fourth fundamental decision -- whether to appeal -- is the one at issue in this case. This, decision alsobelongs to defendant alone. See *Jones v. Barnes, supra*. Here, too, however, the case law has never required that the defendant place such a waiver on the record personally, because the decision does not lend itself to that treatment.

The decision whether to appeal, after all, may occur at any time before the time to appeal has run. It is almost always made some time after proceedings in the trial court have concluded. It requires some preliminary analysis of the trial record and the governing law, even where counsel was present at trial. Indeed, by the time the decision whether to appeal is made, defendant may well be in custody, far from any courtroom. See generally *Peguero v. United States*, __ U.S. __, 119 S. Ct. 961, 964 (1999). Like the decision not to testify, the decision not to appeal may be based on privileged

[8] See, e.g., *Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998) ("Because the burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial counsel, the burden shouldered by trial counsel is a component of effective assistance of counsel"), *cert. petition filed*, No. 98-9842 (Apr. 20, 1999); *United States v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995) (surveying Court of Appeals case law governing defendant's decision whether to testify).

Some states require or suggest that the court conduct an in-court colloquy with a defendant who wishes to waive the right to testify. The "great majority" of states do not. See *State v. Thomas*, 128 Wash. 2d 553, 558-60, 910 P.2d 475, 478-79 (1996) (survey of case law).

discussions that the defendant would rightly be reluctant to place on the record. So here, too, the waiver is not placed on the record in the trial court. The burden necessarily falls upon defense counsel to ensure that any waiver is knowing and voluntary.

The right to effective assistance of counsel is thus "required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated." *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970).[9]

[9] The burden that the system places upon defense counsel is highlighted by the procedures required for waivers of the right to appeal sentencing issues in connection with guilty pleas. The Courts of Appeals have carefully policed agreements to waive the right to appeal to ensure that the record shows, not only that the elaborate safeguards of Rule 11, Fed. R. Crim. P., were observed, but that the specific waiver of the right to appeal was knowing and voluntary. See *United States v. Blackwell*, 172 F.3d 129, 130 (2nd Cir. 1999) (knowing and voluntary waiver of right to appeal in connection with guilty plea must appear on the record); *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (waiver of right to appeal must be voluntary and intelligent; upholding waiver because explained to defendant on the record); *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir.), *cert. denied*, 119 S. Ct. 254 (1998); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995).

No such safeguards are in place for post-trial decisions to forgo the right to appeal. The contrast only highlights the fact that, in the post-trial context, the system relies almost entirely upon defense counsel to ensure a voluntary and intelligent waiver.

C. Although the decision is defendant's, counsel is charged with the duty of ensuring that any waiver of appellate rights is informed and voluntary.

Because waiver of the right to appeal is ordinarily accomplished only by silence, and because it takes place out of court, the role of counsel in ensuring an effective waiver is essential. Consequently, this decision lies at the intersection of the Fifth/Fourteenth Amendment guarantee of due process and the Sixth Amendment guarantee of effective assistance of counsel. Due process requires that the waiver be voluntary and informed. The Sixth Amendment requires that counsel render effective assistance in ensuring that it is so.

The accused has the right to the effective assistance of counsel at every stage of the trial proceedings. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Just as clearly, that guarantee of effective assistance of counsel extends to a direct appeal. *Evitts v. Lucey*, 469 U.S. at 393; *Douglas v. California*, 372 U.S. 353 (1963). Petitioner's brief suggests, however, that the period after sentencing, but before appeal, is a sort of Constitutional no-man's land. During this hiatus, according to Petitioner, counsel need not do anything unless the client thinks to ask.

Contrary to Petitioner's argument, the requirement of effective assistance of counsel must continue from trial through the appeal process, without a break. Indeed, counsel's advice is nowhere more crucial than in the short time allotted for filing an appeal after sentencing. In this respect, NACDL finds itself in agreement with the *amicus* brief of the Solicitor General. See *Amicus* Brief for United States at 12-13 ("Respondent's right to counsel accordingly

included the right to consult with a lawyer, at or around the time that judgment was entered against him, concerning the possibility and advisability of pursuing an appeal from his conviction or sentence.").

This Court's precedents are in accord. *Evitts v. Lucey*, *supra*, for example, impliedly held that there is no post-sentence hiatus in the duty of the attorney to furnish effective assistance. In that case, counsel had filed a notice of appeal, but the appeal was dismissed because he failed to perfect it by filing the "statement of appeal" required under state law. This Court noted that, on appeal, counsel's

> assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all--much less a favorable decision--on the merits of the case. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all.

469 U.S. at 394 n.6. The implication is clear that attorney conduct that results in the default of the client's threshold right to appeal, without the client's consent, falls short of the Constitutional minimum.

The duty to counsel the client as to whether to appeal, while reserving ultimate decision to the client, is also implicit in this Court's decision in *Anders v. California*, 386 U.S. 738 (1967). This Court overturned a procedure that

permitted appointed counsel to withdraw, over the client's objection, based on counsel's opinion that the appeal lacked merit. The attorney in *Anders* failed in his role as advocate because he usurped the client's ultimate decision to take an appeal. See also *Penson v. Ohio*, 488 U.S. 75 (1988).[10]

The federal Courts of Appeals that have dealt squarely with the issue have also held that the Sixth Amendment governs counsel's conduct in the interim between sentencing and the expiration of defendants' time to appeal.[11]

At first it appears paradoxical that, because this decision is personal to the defendant, it cannot be made without the involvement of counsel. In reality, however, there is no contradiction. The decision whether to appeal is peculiarly enmeshed in legal technicalities. It depends first upon a review of the trial record. The advocate must determine whether there have been legal errors and, if so, whether they were properly preserved. The advocate must assess the likelihood of success, given the strength of the merits and the applicable standards of review. The advocate must also consider the possibility of adverse consequences in the event of a cross-appeal or an open-ended remand. Yet the ultimate decision is committed to a lay defendant,

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[10] In *Lozada v. Deeds*, 498 U.S. 430 (1991), this Court reversed the denial of a certificate of probable cause for appeal where defendant had alleged ineffective assistance of counsel based upon counsel's failure to advise him of his right to appeal. In doing so, the Court did not cast any doubt upon the lower court's holding that this constituted deficient performance. Rather, it reversed the the denial of a certification of probable cause to appeal, finding that a reasonable appellate court might reverse the lower court's holding that defendant had not shown prejudice from the attorney's error.

[11] See, e.g., cases cited at pp. 16-17, infra.

unlearned in the law. Without adequate counsel, a defendant's personal right to decide whether to appeal simply cannot be exercised meaningfully. Counsel is therefore charged with the duty of making sure that the defendant understands the nature and ramifications of this decision.

D. Constitutionally effective counsel cannot forgo the right to appeal without first consulting with the client and ascertaining the client's wishes.

The question remains as to what duties the Constitution imposes upon counsel in the post-sentencing, pre-appeal period. This Court's cases strongly imply an answer, and the norms of the profession supply one. A reasonable attorney must, at a minimum, consult with the client and ascertain the client's informed wishes with respect to filing an appeal.[12]

Counsel, here as elsewhere, must satisfy Constitutional standards of effective assistance. A reviewing court will accordingly analyze counsel's conduct for deficient performance and prejudice, under the familiar two-pronged analysis of *Strickland v. Washington*, 466 U.S. at 687.

The Constitutional standard of attorney performance incorporates a few "basic duties":

> Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest....From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and *the more particular duties to consult with the defendant on important decisions* and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. at 688 (emphasis added; citations omitted).

At stake here is not the exercise of skill, which can present close questions of judgment for a reviewing court. Rather, this case involves the attorney's uncontroversial, "basic duty" to "consult with the client on important decisions" and, if appropriate, to file a simple notice of appeal. The decision whether to appeal, as one of the fundamental decisions reserved for the defendant alone, is *a fortiori* "important" enough to require the attorney to consult and ascertain the client's wishes.

That duty to consult implies that a reasonable attorney is required to do more than merely obey in the event that the client knows enough to ask the attorney to file a notice of appeal. *Strickland* imposes a general *affirmative* duty to consult on important issues. And the Courts of Appeals, implementing *Strickland*, have not hesitated to impose specific affirmative duties upon counsel in connection with assisting defendants with the decision whether to appeal.

[12] We do not mean to suggest that this standard exhausts the duty of counsel, even for Sixth Amendment purposes, but it is at least a minimal floor below which a reasonable advocate cannot go.

For example, in *Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991), the court reversed the denial of habeas relief and summarized counsel's duties as follows:

> Defense counsel must explain the advantages and disadvantages of an appeal.... The attorney should provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success.... Counsel must also inquire whether the defendant wants to appeal the conviction; if that is the client's wish, counsel must perfect an appeal.

Id. at 1499 (citations omitted). See also *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); *Jackson v. Turner*, 442 F.2d 1303 (10th Cir. 1971).

Strickland requires that counsel's conduct be evaluated in light of "prevailing professional norms," including "American Bar Association standards and the like." 468 U.S. at 688-89. The American Bar Association Standards impose a duty upon defense counsel to consult with the client and to abide by the client's wishes with respect to filing an appeal. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4.82 (3d ed. 1993) ("ABA Standards"). [13]

[13] ABA Standards § 4-8.2. provides:

> (a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and the defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal.

Indeed the California Penal Code §1240.1(a) (West Supp. 1999) specifically requires that trial counsel "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." On the other hand, seemingly no jurist or responsible commentator takes the position that it is *not* part of counsel's function to discuss the pros and cons of taking an appeal with the client, in order to permit the client to make an informed decision. There is wide agreement in the profession that a defense attorney owes the client at least that much.

Indeed, even the parties to this appeal appear to be in partial agreement as to some matters. An attorney who adequately discussed the matter with the client, and obtained the client's informed decision not to appeal, would of course meet the Constitutional standard. Conversely, an attorney who disregarded the client's explicit request to file an appeal would clearly fall below the Constitutional standard. See *Peguero v. United States*, 119 S. Ct. at 965 (discussing *Rodriquez v. United States*, 395 U.S. 327 (1969)). Petitioner errs, in our view, by assuming that such complete and wilful dereliction is the *only* manner in which counsel can be ineffective with respect to the filing of an appeal.[14]

[14] The district court decision reversed by the decision below was informed by the view that only counsel's direct disobedience of a client's direction to file an appeal would constitute ineffective assistance. The matter was referred to the magistrate judge for an evidentiary hearing on

The issue in this case, like most ineffective assistance issues, falls between the obvious extremes. It has never been the law that a finding of ineffectiveness must be premised upon the lawyer's utter faithlessness. The fact that counsel showed up for trial or did not directly disobey the client will not defeat an ineffective-assistance claim where counsel's conduct of of the defense fell below professional standards. As in all ineffective-assistance cases, counsel's conduct with repect to filing an appeal must be evaluated with reference to an "objective standard of reasonableness." *Id.* at 687-88.

In Petitioner's view, counsel has no duty even to inform a convicted defendant of the availability of an appeal, much less to ensure that the defendant's decision to forgo an appeal is an informed one. Petitioner's Brief at 17-20. For the reasons expressed herein, *Amicus* NACDL believes that the Constitution requires defense counsel to advise the client and protect the client's interest with respect to an appeal. That is why counsel is there. In any event, however, counsel cannot fulfil even the minimal duty to abide by the client's wishes -- which Petitioner acknowledges -- unless counsel ascertains what those wishes are.

"the limited issue of the credibility of [Respondent's] assertions that [counsel] had promised to file a notice of appeal on his behalf." (JA 153) The magistrate judge found that Respondent had possessed "little or no understanding of ... what the appeal process was, or what appeal meant at that stage of the game." The magistrate judge found that respondent "did not consent" to the failure to file an appeal, but implied that he did not affirmatively request that one be filed either: he "had not met his burden of proving by a preponderance of the evidence that [counsel] had promised to file a notice of appeal on his behalf." (JA 154; *see also* JA 132-33)

Petitioner would have the courts, and defense counsel, infer waiver from silence. For the reasons expressed above, only adequately counseled silence deserves that consideration. Convicted defendants should therefore be afforded the opportunity to demonstrate that their failures to appeal were not adequately counseled. The decision whether to appeal is fraught with legal and strategic considerations far beyond the capacity of most nonlawyers to assess. Where, as here, that highly legal decision is committed by law to a lay defendant, the *actual* assistance of counsel is a minimum Constitutional prerequisite.[15] Anything less is a hollow guarantee.

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[15] Petitioner raises the specter of mass revivals of procedurally defaulted appeals, and even the United States as *amicus* opines that affirmance might require collateral relief "upon a simple allegation of nonconsent...." (See Pet. Brf. at 11-12; *Amicus* Brief of United States at 15.) This argument confuses the issue with the proof. True, the attorney's advice and the client's decision not to appeal will ordinarily have taken place in private. Many, perhaps most, ineffective-assistance claims involve private advice that passed between lawyer and client. See, e.g., *Hill v. Lockhart*, 474 U.S. 52 (1985). But affirmance would not bind the court to grant a *habeas* or § 2255 petition, only to hear it. Such a court will have to consider *whether* defense counsel failed to consult with defendant and *whether* defendant consented to forgo an appeal. The proofs might, as in this case, involve testimony from defense counsel and/or defendant, which the district court might or might not choose to credit.

It hardly requires stating that the courts may expect candor from reputable defense counsel. It is also obvious that counsel who have assiduously counseled their clients as to the advisability of an appeal will have no incentive to misremember or misrepresent that fact.

E. Defense counsel's central role makes it important that this Court set the minimum Constitutional standard of legal representation in this area.

Recently this Court held that a trial court's failure to notify defendant of the right to appeal was harmless because defendant knew his rights. *Peguero v. United States*, *supra*. That case dealt not with the broad issues of waiver or effective assistance, but with the court's advice of the right to appeal required by the Federal Rules of Criminal Procedure. The *Peguero* holding, however, points up the central role of defense counsel in safeguarding the right to appeal. Defendants have nowhere else to turn for the information they need.

Above all, the discussion in *Peguero* demonstrates the need for this Court to impose a clear, Constitutionally-based minimum standard of representation in this troubled area. The period immediately following sentencing is often a fragile point in the attorney-client relationship. Some attorneys may be unwilling, or feel themselves unqualified, to handle an appeal. Court-appointed counsel are too often confused or unaware that their duties include the filing of a timely notice of appeal, or may be reluctant to file a notice of appeal that may carry with it the obligation to see the appeal through to its conclusion.

> It will often be the case that, as soon as sentence is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney. The relationship between the defendant and the attorney may also be strained after sentencing, in any event, because of the defendant's disappointment over the outcome of the case or the terms of the sentence. The attorney, moreover, concentrating on other matters, may fail to tell the defendant of the right to appeal ....

119 S. Ct. at 964. In short, as this Court has made clear, the opportunities to slip up are many, and the consequences of doing so are permanent and dire.

The court's advice that the right to appeal exists is of course an important prerequisite, but it does not in itself guarantee an informed waiver. Petitioner suggests that the court's advice is enough, but the attorney's duties are more comprehensive. Indeed, even a guilty plea accompanied by the elaborate advice required by Rule 11, Fed. R. Crim. P. and *Boykin, supra*, may nevertheless be invalid because counsel was ineffective. See *Hill v. Lockhart, supra*.

Filing a notice of appeal is a simple administrative step, but it is the bottleneck through which all appeals must pass. Failing to file a notice of appeal, therefore, is no routine omission. Because an appeal is ordinarily barred after a certain deadline,[16] the attorney's failure to file is the equivalent of a decision to waive an appeal. That decision is the client's alone to make. If a defense attorney fails to file a notice of appeal, without having obtained the client's informed consent, the attorney has not just violated the duty

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[16] In California, a criminal defendant must file a notice of appeal within 60 days of sentencing. *See* Rule 31(a), Cal. Rules of Court. In the federal system, a criminal appeal must ordinarily be filed within 10 days of entry of judgment. *See* Fed. R. App. P. 4(b) (with irrelevant exceptions). Though deadlines differ, the principle is the same.

to counsel the client; the attorney has usurped a fundamental decision that rightfully belongs to the client. See *Jones v. Barnes*, 463 U.S. at 753 (Blackmun, J., concurring).

Amicus NACDL writes, on the one hand, to welcome this Court's guidance in clarifying the Constitutional obligation to consult with clients about the advisability of an appeal, and to ascertain the client's wishes with respect to filing an appeal. We also write to acknowledge that mistakes may occur, and to urge that when they do, defendants should not be penalized to the extent of sacrificing the crucial right to test the legality of their convictions and sentences on appeal.

F. *Amicus* NACDL endorses Respondent's position that *Strickland* "prejudice" does not require a showing of likelihood of success on appeal.

In conclusion, NACDL briefly endorses the position of the Respondent that the Strickland requirement of "prejudice" does not require the defendant to demonstrate that an appeal would have been meritorious or successful. See *Rodriquez v. United States*, *supra*.

In addition to the reasons stated in the other briefs, such a requirement fails to take into account the fundamental nature of the decision to appeal. Like the decision whether to testify, this decision is not merely "tactical" or "important." A small handful of fundamental decisions are reserved to the client out of respect for individual autonomy and the "inestimable worth of free choice." *Faretta*, *supra*, 422 U.S. at 834; see also *id.* at 833; *Rock*, *supra*.

An interpretation of "prejudice" that takes the fundamental decision whether to appeal *at all* out of the client's hands, based on a preliminary assessment of the merits, is akin to the procedure rejected in *Anders*, *supra*. *Anders* required at a minimum that the attorney act as an advocate to the extent possible, in order to aid the court in a determination on the merits. Respondent here, like the defendant in *Anders*, has never had the benefit of a hearing of his claims on appeal with the assistance of counsel. A preliminary determination of non-merit, by a trial-level court at that, is inherently not an adequate substitute.

In addition, it is impractical to ask the trial courts to reconstruct the possible basis for an appeal, and to handicap the defendant's chances of success. The process would require the trial court to identify meritorious issues that defendant is asserting, or that defendant could assert, if afforded the assistance of counsel. That assessment would ordinarily occur in the context of a *habeas* or Section 2255 petition, where defendants often proceed *pro se*. Such a procedure is no substitute for the assistance of an advocate dedicated to uncovering error in the defendant's conviction or sentence. Cf. *Peguero*, supra, 119 S. Ct. at 965-66 (O'Connor, J., concurring)(prejudice does not entail showing of meritorious grounds for appeal). Moreover, the trial judge is inherently handicapped in making this determination, because it is in the very nature of a successful appeal that the trial judge's view is different from that ultimately adopted by the appellate court.[17]

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[17] Two other contexts where a trial court may be called upon to consider a defendant's likelihood of success on appeal are motions for bail pending appeal of a criminal conviction, see 18 U.S.C. § 3143, and certificates of appealability of the denial of *habeas corpus* relief, see 28 U.S.C. § 2253(c). They are not relevant to the issue here, i.e., the trial

Consequently, counsel's denial of the client's right to control this fundamental aspect of the defense ought to suffice to require the very minimal relief of access to the appellate process.

At the very least, "prejudice" in this context should be interpreted by analogy to the standard for advising a client whether to plead guilty. In that context, "prejudice" requires a showing, not of likelihood of success at trial, but only a "reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart, supra*, 474 U.S. at 59. That standard, which is urged by *amicus* the United States, at least has the virtue of focusing on the outcome of the process at hand -- *i.e.*, the decision whether to appeal -- rather than jumping many contingent steps ahead in order to guess the ultimate outcome of the appellate proceeding.[18]

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court's assessment of whether defendant was denied access to a direct appeal as of right as a result of ineffective assistance of counsel.

Release on bail, while important, is tangential to the merits of the case, and the grant or denial of bail does not affect defendant's access to an appeal. The requirement of a certificate of appealability is a statutory restriction on jurisdiction to hear an appeal from the denial of collateral relief. Such a restriction does not stand on the same footing as the attorney's default of the client's direct appeal as of right.

[18] In this particular case, defendant was not explicitly called upon to demonstrate whether he would have appealed absent counsel's error, but there are many indicia that he would have done so. As the factfinder below concluded, defendant did not understand his rights and did not consent to counsel's failure to file a notice of appeal. (JA 133) Defendant stated below that he intended for counsel to file a notice of appeal, and he did attempt on his own to file a notice of appeal approximately four months after his sentencing, but this appeal was denied as untimely. (JA 44)

CONCLUSION

For the reasons stated above and in petitioner's brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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